86-1456

Supreme Court, U.S.
FILED
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DORIS L. PYZER, Executrix of the Estate of
LLOYD E. PYZER, M.D.,
Appellant,

VS.

CAROL PERRY and STANLEY PERRY,
Appellees.

On Appeal from the Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

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March 6, 1987

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QUESTION PRESENTED

The question presented is whether Rule 1616(c) of the California Rules of Court offends the due process or equal protection clauses of the Fourteenth Amendment, where the Rule, which prohibits use of evidence from an arbitration hearing to be used at a trial de novo for any purpose, including impeachment, is applied to a party surprised by inconsistent testimony at trial by a principal witness for the opposition, and where the inability to impeach the witness substantially affects the outcome of the trial of the civil case.

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DORIS L. PYZER, Executrix of the Estate of LLOYD E. PYZER, M.D.,
Appellant,[1]

VS.

CAROL PERRY and STANLEY PERRY,
Appellees.

On Appeal from the Court of Appeal of the State of California

JURISDICTIONAL STATEMENT

Doris L. Pyzer, executrix of the estate of Lloyd E. Pyzer, M.D., the appellant, appeals from the final judgment of the Court of Appeal of the State of California, First Appellate District, Division Four, dated September 17, 1986, denied review by the California Supreme Court December 10, 1986, holding that California Rule of Court 1616(c) as applied in this case, is not unconstitutional as violative of the due process or equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

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[1] Doctor Pyzer died during the pendency of the appeal, and Doris L. Pyzer, executrix of his estate, was substituted as appellant.

OPINIONS BELOW

The opinion of the California Court of Appeal for the First Appellate District, Division Four, which appears in the appendix hereto, p. A-1, is not reported.

The denial of review by the California Supreme Court, which appears in the appendix hereto, p. B-1, is not reported.

JURISDICTION

The final judgment of the California Court of Appeal was denied review by the California Supreme Court on December 10, 1986.

A notice of appeal to this Court was timely filed in the California Court of Appeal March 2, 1987.

This appeal is being docketed within ninety days from the denial of review below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

No State . . . shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article 6, Section 6:

To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform the functions prescribed by statute.

California Code of Civil Procedure, § 1141.14:

Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration

under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter.

California Code of Civil Procedure, § 1141.24

In cases ordered to arbitration pursuant to Section 1141.16(a), absent a stipulation to the contrary, no discovery shall be permissible after an arbitration award except by leave of court on good cause shown.

Rule 1612, California Rules of Court:

The parties to the arbitration shall have the right to take depositions and to obtain discovery, and to that end may exercise all of the rights, remedies, and procedures, and shall be subject to the same duties, liabilities, and obligations as provided in Part 4, Title 3, Chapter 3 of the Code of Civil Procedure, except that all discovery shall be completed not later than 15 days prior to the date set for the arbitration hearing unless the court, upon a showing of due cause, makes an order granting an extension of time within which discovery must be completed.

Rule 1616(c), California Rules of Court:

The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial.

HOW THE FEDERAL QUESTION WAS RAISED

During trial, upon being surprised by inconsistent testimony of witness Pearl Chames, counsel for appellant sought to impeach the witness and later moved to reopen trial to admit impeaching testimony, asserting that the defendant's right to a fair trial would be defeated if he were not permitted to present evidence tending to prove perjury by the witness. Rule 1616(c) of the California Rules of Court was invoked to prevent the use of the impeaching

testimony. The jury verdict was adverse to appellant, although the jury assigned fifty-five percent comparative negligence to the plaintiff.

Upon appeal to the California Court of Appeal, appellant asserted that Rule 1616(c) was unconstitutional and that he had been deprived of due process and equal protection of the laws by the trial court's exclusion of the impeaching testimony. The California Appellate Court ruled that Rule of Court 1616 did not violate the constitution.

In his petition for review before the California Supreme Court, appellant reiterated his Fourteenth Amendment claims, stating that by barring him from a full exposition of his case, and preventing him from exposing perjured testimony, the rule deprived him of a fair trial and due process of law. In addition, appellant asserted that equal protection of the laws was not afforded him, in that as one whose matter had proceeded through the arbitration process, he was selected out for an exclusion rule which was neither rationally necessary nor reasonable. Supreme Court review was denied, although Mr. Justice Mosk was of the opinion that the petition should be granted. The federal question was thus presented and rejected by the court below.

STATEMENT OF THE CASE

This appeal arises out of the denial of a defense motion to introduce impeaching testimony on the final day of a medical malpractice trial. A co-defendant physician had settled before trial. Pearl Chames, the witness whom appellant sought to impeach, was a principal witness for the plaintiffs and was the mother of plaintiff Carol Perry.

At the trial de novo, the witness Chames testified that at the request of the attending physician she had gathered up all of the medication she could find in her daughter's house, put it in a shoe box and brought it to the hospital emergency room where Carol was being treated for a cardiac arrest, and that was the last she saw of it. [C-21]

The testimony sought to be introduced would show that the witness had earlier testified that she had received back the shoe box full of drugs before her daughter was discharged from the hospital and that she had destroyed the drugs. [D-1, 7, 8]

At the trial de novo, however, Chames testified that she had not seen the shoe box or the drugs after turning them over to the hospital and denied having received them back and denied having destroyed them. [C-21-24] Only three small envelopes of drugs, which were identified as prescriptions coming from appellent, were kept.

Defense counsel sought successfully to impeach the witness immediately upon discovery of the conflict in her testimony [C-22], and on the next court day moved to reopen the trial for the receipt of additional evidence, without success.

Without having heard the impeaching evidence, the jury found for plaintiff, but assessed a fifty-five percent comparative negligence proportion against plaintiff. [F-3]

Defense efforts to impeach the witness, made immediately upon discovery of the conflict in testimony, were frustrated by the trial court's application of Rule 1616 of the California Rules of Court, which in subpart (c) forbade the use at a trial de novo of any evidence adduced at the arbitration hearing for any purpose, including impeachment. Defense arguments that the trial judge had discretion to disregard the Rule in these premises or to control the incoming testimony so as to preserve the confidentiality of the arbitration hearing, were overruled, and further arguments challenging the establishment of the rule and praying for a fair trial were similarly disposed of. [G-1] On appeal to the California Court of Appeal, appellant asserted that Rule 1616(c) violated the due process and equal protection clauses of the Fourteenth Amendment. [E-1] The Court of Appeal upheld the verdict below, holding that Rule 1616 was constitutional. [A-6]

The denial of petition for review before the California Supreme Court [B-1] followed, bringing the case to this Court.

THE QUESTION IS SUBSTANTIAL

Arbitration is one of several approaches to alternative dispute resolution receiving attention at a time when the courts of the nation are heavily burdened. California instituted a program to facilitate the disposition of cases through court ordered arbitration. The legislature assigned the task of making rules for the conduct of the arbitration process to the California Judicial Council, a rule making body chartered by the California Constitution.[2] At the very outset of the program more than twenty-four thousand cases were taken into the arbitration process.[3] Arbitration continues to be an important arm of the courts throughout the nation in achieving an efficient disposition of disputes.[4]

To secure the promise of greater efficiency, the Judicial Council promulgated a number of rules, including the Rule complained of in this case.

Court ordered arbitration in California is an adversarial proceeding. It is to be distinguished from mediation or conciliation proceedings, which are also important alternative dispute resolution approaches. Unlike mediation or conciliation, in arbitration there is not a particular emphasis upon confidentiality of matters disclosed. The mediator also participates actively and directly with the parties to the proceedings in an impartial way to urge them toward settlement. Where in a mediation setting one of the parties sought to subpoena the mediator before the N.L.R.B. administrative law judge to support its version of the factual dispute, the Ninth Circuit in *N.L.R.B. v. Macaluso, Inc.*, 618 F.2d 51; 104 L.R.R.M. 2097; (1980) ruled that the interest in maintaining the perceived and actual impartiality of a mediator overbalanced the value of the mediator's testimony in the case.

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[2] California Constitution, Article 6, Section 6.

[3] Amounting to 58% of civil cases, one fifth of the pending caseload of the larger courts. *Los Angeles Daily Journal* v. 94, p. 1, July 14, 1981.

[4] More than 200 of the country's trial courts now have court-administered arbitration. "What we know and don't know about court-administered arbitration." D.R. Hensler *Judicature* v. 69, no 5, p. 270, Feb-Mar 1986.

Under the California system of court ordered arbitration, in the event of a trial de novo being called for by one of the parties after arbitration, the matter proceeds to trial upon an accelerated schedule, and discovery is closed off, except upon order of court.[5]

In this case, the witness' reversal of the testimony which she had given in the arbitration hearing surprised defense counsel. They had expected her to testify fully and truthfully, as she had apparently done in the arbitration hearing. They did not seek a court order to pin down each point of the testimony of witnesses in the arbitration hearing. To have conducted such protective discovery would have greatly increased the expense and time invested in the case. They relied upon the honesty of the witnesses. They were further surprised by the silence of counsel for the plaintiffs and the willingness of those attorneys to seek the shelter of Rule 1616(c). Even then, defense counsel were confident that the trial judge enjoyed discretion to disregard the rule and would exercise it in the interest of justice. But the trial judge did not explore any possibilities of resolving the matter other than making strict application of Rule 1616(c). [G-1] In so ruling, he anticipated the judgment of the California Court of Appeal, which held that the trial judge could not admit evidence of the Chames testimony without referring to the arbitration proceeding, which would be a violation of the mandatory statutory prohibition of such reference. [A-6]

Thus at the conclusion of the trial, only the lawyers knew that the plaintiff's mother had testified that she had destroyed the shoe box full of drugs and later changed her testimony. The jury was obliged to enter its deliberations without this potentially damaging evidence.

In other proceedings where rules of exclusion have been called into play, the overriding interest in full disclosure of truth has prevailed over other policy considerations. For example, in *U.S. v. Havens* (1980) 446 U.S. 620, a criminal case, the interest of the

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[5] California Code of Civil Procedure § 1141.24:

In cases ordered to arbitration pursuant to Section 1141.16(a), absent a stipulation to the contrary, no discovery shall be permissible after an arbitration award except upon leave of court upon good cause shown.

confidentiality of attorney-client communications was subordinated to the greater interest of the integrity of the judicial process. That same integrity is at stake in this civil action. The patent falsity of the proceeding in which counsel are obliged to place the clients' interests above the interests of truth and fairness casts a shadow over the judicial system which permits the practice. It is true that perjury will not frequently be induced by the opportunity which Rule 1616(c) presents, but on those occasions when it does appear, swift and certain corrective action should be available to the court and to the offended party. In *Harris v. New York*, 401 U.S. 222; 28 L. Ed.2d 1; 91 S.C. 643 (1971) the public interest underlying the Miranda exclusionary rule was balanced against the public interest in providing the jury with testimony valuable in assessing the credibility of the criminal defendant. The Court found no right to commit perjury inherent in the criminal defendant's right to testify on his own behalf and allowed impeachment. In the trial de novo after arbitration the local Federal rule[6] permits the use of arbitration evidence to impeach. This indicates the reasonableness of this safeguard.

The fundamental fairness of allowing impeachment of false witnesses is manifest. Our system of justice is based upon a tradition of commitment to truth and fairness. Susannah was exonerated through Daniel's reopening of her trial and impeachment of the elders who had testified falsely against her. The discovery of truth is essential to the equitable resolution of disputes and the forum which eschews this commitment cannot long retain the respect of those who come to know it. Respect for the law is the sinew of government.

The facts of the instant case illustrate the serious obstacles to bringing out the truth on cross examination which inhere in a

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[6] Rule 500-7(b) for the Northern District of California provides as follows:

> Trial De Novo (b) *Limitation on Evidence.* At the trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, *except that statements made by a witness at the arbitration hearing may be used for impeachment only.* [emphasis supplied]

broad application of an exclusionary rule like Rule 1616(c). The ability of the opposing party effectively to cross-examine opposition witnesses is limited severely and the witness is given a license to commit perjury without fear of impeachment. A policy of expedience which permits truth to be disregarded can only tend to the progressive weakening of the body politic. It has been said that the public is entitled to every person's evidence. According to Dean Wigmore, this maxim has existed in civil cases for more than three centuries, and the Sixth Amendment guarantee of compulsory process was created "*merely to cure the defect of the common law by giving the parties defendant in criminal cases the right which was already . . . possessed . . . by parties in civil cases . . .*" *N.L.R.B. v. Macaluso, Inc.*, supra, citing 8 Wigmore, *Evidence* § 2192 at 70, (McNaughton Rev. 1961) (Emphasis added.)

Denial of the equal protection of the laws is present in this context.

When the rule of exclusion of impeaching testimony is applied only to those who have gone through arbitration, the effect is to deny to those litigants a right otherwise available to any other litigant. The rationale for this discrimination will not withstand challenge upon examination. The stated purpose of the statutory underpinning of the California arbitration procedure is to increase efficiency and reduce cost of the resolution of disputes. No decrease in efficiency can arise from a policy which will engender disrespect for the law.

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

FRANCIS E. X. MURPHY
Counsel for Appellant

March 6, 1987

(Appendices follow)

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APPENDIX A

Opinion of the California Court of Appeal

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A028061
(Super. Ct. No. 392577)

CAROL PERRY et al.,
Plaintiffs and Respondents,

v.

DORIS L. PYZER, as Executrix, etc.,
Defendant and Appellant.

Filed: September 17, 1986.

Defendant Lloyd E. Pyzer, M.D., (Dr. Pyzer) appeals[1] a judgment in favor of respondents Carol and Stanley Perry in a medical negligence action. The relevant facts are as follows:

Respondent Carol Perry (Carol) sued Dr. Pyzer for medical negligence in treating her for weight control. Carol contended she suffered a cardiac arrest as a result of Dr. Pyzer's negligent administration of various drugs. The matter was heard in arbitration before retired Judge Peter Anello, who awarded $750,000 against Dr. Pyzer, who rejected the arbitration award.

In a trial de novo the jury, in finding Carol's total damages at $1,083,178.84, found Carol 55 percent negligent and Dr. Pyzer 45 percent negligent, and further found that Dr. Pyzer's negligence was a legal cause of Carol's injuries. It declined to award punitive damages.

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[1]During the pendency of appeal, Dr. Pyzer died and Doris L. Pyzer, executrix of his estate, was substituted as appellant.

Carol's mother, Pearl Chames (Pearl), testified at both the arbitration hearing and the trial concerning the existence and whereabouts of a shoebox full of Carol's drugs that Pearl had collected and taken to the hospital at its request.

At trial Pearl testified concerning this shoebox as follows: "Q . . . Now, the problem, however, is that we're trying to trace what happened to the shoe box [*sic*].]¶] A. I have no idea after it left my hands. I have no idea what happened to it. [¶] Q. Did you ever receive back from the hospital any of the drugs that were in the shoe box [*sic*]? [¶] A. I didn't. [¶] Q. Who did? [¶] A. I imagine it was her husband. [¶] Q. So the shoe box [*sic*] was returned with drugs in it to her husband? [¶] A. I don't know. [¶] Q. And then did you subsequently destroy those drugs that were in the box? [¶] A. I never saw it after that. [¶] Q. Did you ever flush any drugs down the drain? [¶] A. Myself, no."

Following Pearl's testimony on this point, Dr. Pyzer's counsel made the following offer of proof. "MR. FRISCH: Your Honor, at the time of the arbitration she testified that the drugs that were picked up by Mr. Perry from the hospital, brought back home . . . she was so upset with the fact that — of the amount and numbers that she flushed them down the toilet. That was her testimony before the judge that heard the arbitration. If I'm bound not to bring up what was said at the arbitration, we have got a problem." In accordance with rule 1616 of the California Rules of Court,[2] the trial court refused to admit evidence of Pearl's testimony at the arbitration hearing.

On appeal appellant argues that the trial court improperly excluded evidence of Pearl's prior inconsistent testimony at the arbitration hearing offered to impeach her trial testimony, and that rule 1616 which authorizes this exclusion is unconstitutional as applied. Appellant contends that this exclusion resulted in severe prejudice and a denial of due process to Dr. Pyzer.

Respondents counter that the trial court's ruling on admissibility was correct and that even if it was in error, appellant failed to

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[2]All rules referred to are to the California Rules of Court unless otherwise noted.

show prejudice. Respondents urge this court to dismiss Dr. Pyzer's appeal as frivolous and to award sanctions.

We affirm the judgment and hold that evidence of testimony at an arbitration hearing is inadmissible at a trial de novo in accordance with rule 1616(c).

I

STANDARD OF APPELLATE REVIEW OF THE TRIAL COURT'S EVIDENTIARY RULING

California Constitution, article VI, section 13, provides that "*No judgment shall be set aside,* or new trial granted, in any cause, *on the ground of* misdirection of the jury, or of *the improper admission or rejection of evidence,* or for any error as to any matter of pleading, or for any error as to any matter of procedure, *unless, after an examination of the entire cause,* including the evidence, *the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.*" (Emphasis added.)

"As the case law explains, miscarriage of justice occurs if based upon the entire record the court concludes that it is reasonably probable that a result more favorable to appellant would have beeen reached in the absence of the error." (*People* v. *Forster* (1985) 169 Cal.App.3d 519, 525; see *People* v. *Watson* (1956) 46 Cal.2d 818, 837.) "The test is 'necessarily [ ] based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated.' " (*Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.* (1984) 36 Cal.3d 752, 770, quoting *People* v. *Watson, supra,* 46 Cal.2d at p. 837.)

The burden is on the appellant to prove that the trial court committed an error of law, and that this error resulted in a miscarriage of justice and prejudice to the appellant.

II

THE TRIAL COURT COMMITTED NO ERROR OF LAW BECAUSE RULE 1616 IS VALID, AS ENACTED BY THE JUDICIAL COUNCIL UNDER AUTHORITY OF SECTION 1141.14 OF THE CODE OF CIVIL PROCEDURE.[3]

Appellant argues that rule 1616 is inconsistent with section 351 of the Evidence Code which states that "Except as otherwise provided by statute, all relevant evidence is admissible." Appellant contends that this inconsistency renders rule 1616 *ultra vires* and unconstitutional as applied. We find no inconsistency between rule 1616 and the Evidence Code.

The Judicial Council derives its power to make rules from article VI, section 6 of the California Constitution, which states in pertinent part: "To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute." These rules, "if they do not transcend legislative enactments or constitutional provisions, have the force of positive law binding on the court and parties as procedural statutes." (*Albermont Petroleum, Ltd.* v. *Cunningham* (1960) 186 Cal.App.2d 84, 89.)

Section 1141.14 directs the Judicial Council as follows: "*Notwithstanding any other provision of law* except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter . . . Council rules shall provide for and conform with the provisions of this chapter." (Emphasis added.)

In accordance with this direction, the Judicial Council adopted judicial arbitration rules for civil cases as set forth in rule 1600 et seq. Rule 1616 provides in pertinent part, at a trial de novo following arbitration, "(c) *The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial* to the arbitration award, to the fact that there had

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[3]Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

been arbitration proceedings, *to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used* as affirmative evidence, or *by way of impeachment,* or for any other purpose at the trial." (Emphasis added.)

Appellant's reading of section 351 of the Evidence Code ignores the express intent of the Legislature as indicated by the words "*Except as otherwise provided by statute. . . .*" (Emphasis added.) On its face section 351 of the Evidence Code permits the enactment of exceptions to its general rule that "all relevant evidence is admissible." It is clear that if another statute provides otherwise, this section does not apply. Thus, the statutory authorization in section 1141.14 for the creation of rules of arbitration "Notwithstanding any other provision of law" does not violate article VI, section 6 of the California Constitution because there is no inconsistency between the statutes: they are mutually exclusive.

Statutory exclusion of otherwise relevant evidence is not limited to the case of arbitration proceedings. There are a number of sections in the Evidence Code which explicitly make inadmissible such relevant evidence.[4] The Legislature enacted these exceptions to section 351 for reasons of public policy and in recognition that some evidence is too unreliable to be presented to the trier of fact. Other codes also contain similar provisions excluding otherwise relevant evidence.[5]

Strong public policy supports the exclusion of evidence of testimony taken during arbitration. Section 1141.10 sets forth the

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[4]See, e.g., Evidence Code section 352 (evidence which is cumulative, unduly prejudicial, etc.), sections 900-1070 (privileges), sections 1100-1156 (extrinsic policies) and section 1200 (hearsay).

[5]See, e.g., Civil Code section 79.06; 79.09, 227; section 1747; Education Code section 14026; Financial Code section 8754; Government Code sections 15619, 18573, 18934, 18952, 20134, 31532; Health and Safety Code sections 211.5, 410; Insurance Code sections 735, 855, 10381.5; Labor Code section 6319, Penal Code sections 290, 938.1, 3046, 3107, 1105; and Vehicle Code sections 1801, 16005, 20012 through 20015, 40803, 40804, 40832 and 40833.

finding of the Legislature that, in order to spare parties the burden of time-consuming and costly small civil claims, "courts should encourage or require the use of arbitration for such actions whenever possible. [¶] (b) *It is the intent of the Legislature that*: . . . [¶] (2) *Arbitration hearings shall be as informal and private as possible* and shall provide the parties themselves maximum opportunity to participate directly in the resolution of their disputes, and shall be held during nonjudicial hours whenever possible." (Emphasis added.)

This intent is implemented by section 1141.25 which states: "*Any reference to the arbitration proceedings* or arbitration award *during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.*"[6] (Emphasis added.)

Evidence of Pearl's alleged testimony at the arbitration hearing cannot be admitted at trial without referring to the arbitration proceedings — a violation of the mandatory language in section 1141.25 prohibiting such reference. The rules and statutes governing arbitration proceedings are strictly enforced. (*Genovia* v. *Cassidy* (1983) 145 Cal.App.3d 452; *Weber* v. *Kessler* (1981) 126 Cal.App.3d 1033.)

We find that the trial court committed no error of law. Rule 1616 does not violate the Constitution, or conflict with the Evidence Code, and was enacted by the Judicial Council within the scope of its authority as defined under both the Constitution and the Code of Civil Procedure.

III

EVEN ASSUMING ERROR, THERE WAS NO MISCARRIAGE OF JUSTICE OR PREJUDICE TO THE APPELLANT

As previously stated, miscarriage of justice occurs if the court concludes that it is "reasonably probable that a result more favorable to appellant would have been reached in the absence of

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[6]Section 657 provides grounds for reversal or new trial.

the error." (*People* v. *Forster, supra,* 169 Cal.App.3d at p. 525.) The court must be convinced of the harmful nature of the error after an examination of the *entire* record. (*Ibid.*)

Appellant argues that it was a miscarriage of justice to refuse to admit evidence of Pearl's prior testimony at the arbitration hearing, because the shoebox full of medication "had early been a focus of the defense rationale." We find no miscarriage of justice and no prejudice to appellant on the record before this court.

The express legislative intent to keep judicial arbitration as informal and private as possible is supported by rule 1614 which states in pertinent part: "(b) The arbitrator may, but is not required to make a record of the proceedings. *Any records of the proceedings made by* or at the direction of *the arbitrator shall be deemed the arbitrator's personal notes* and are not subject to discovery, . . ." In accordance with this rule there is no record before this court of Pearl's testimony at the arbitration hearing. No such record can be discoverable under the rules for judicial arbitration.

It is not "reasonably probable" that the result at trial would have been more favorable to the appellant even if some kind of evidence of Pearl's alleged prior statements had been admitted. The appellant was free to examine or cross-examine any other witness concerning the contents and whereabout of the shoebox, and appears to have so questioned Dr. Jackson, Carol's treating physician. The rules of judicial arbitration do not prevent appellant from conducting thorough *pretrial* discovery with regard to the shoebox. Section 1141.24 states that "no discovery shall be permissible after an arbitration award except by leave of court upon a showing of good cause." Good cause does not include reopening discovery on grounds that existed before arbitration. (*McCormick* v. *Sentinel Life Ins. Co.* (1984) 153 Cal.App.3d 1030, 1051-1052.)

IV

THE APPEAL IS NOT FRIVOLOUS AND NO SANCTIONS SHALL BE AWARDED

The proper standard for determining whether an appeal is frivolous was set out by our Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, as follows: "*an appeal should be held to be frivolous only when it is prosecuted for an improper motive* — to harass the respondent or delay the effect of an adverse judgment — *or when it indisputedly has no merit* — when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.] [¶] However, any definition must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal." (Emphasis added.)

There is no indication that this appeal was taken for an improper reason, nor is it completely devoid of merit. (*In re Marriage of Flaherty, supra,* 31 Cal.3d at p. 649.) Therefore, we reject respondent's argument that this appeal is frivolous and decline to award sanctions.

The judgment is affirmed.

ANDERSON, P. J.

We concur:

POCHE, J.

SABRAW, J.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, No. A028061
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

PERRY et al.,
Respondents,
v.
PYZER, as Executrix, etc.,
Appellant.

Filed: December 10, 1986.

Appellant's petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

BROUSSARD
Acting Chief Justice

APPENDIX C
Transcript of Testimony of Witness Pearl Chames

San Jose, California January 26, 1984

PROCEEDINGS

MR. BRAZIER: Call Mrs. Pearl Chames, your Honor.

PEARL CHAMES,

called as a witness for the Plaintiffs, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRAZIER:

Q Would you state your name and address, please, and spell your last name?

A Pearl Chames, C-h-a-m-e-s.

Q Pearl, would you like to move your microphone up a little closer?

A My address is 6060 Montalvo Drive, San Jose, 95123.

Q You don't have to wring your hands. I promise we won't bite.

Mrs. Chames, can you tell us your relationship to Carol Perry?

A She's my daughter.

Q Is your husband still alive?

A Yes, he is. He's in the courtroom.

Q I'm sorry, I haven't met the gentleman yet.

A Steve Chames.

Q And can you tell me when you two were married?

A We married in 1935.

Q Where were you living when Carol was born?

A In San Francisco.

Q At that time, were you employed outside the home?

A No.

Q What did you do before that or after that in terms of employment?

A After that, I — well, first I worked — went to work for Suntan (inaudible) Company, and then I worked for the 12th Naval District in their office. And finally I went to work — well, my husband was in the Service — I started working for the F. W. Woolworth Company for thirty-seven years.

Q Thirty-seven years?

A Um-hum.

Q What did your husband do for a living?

A My husband, when we first got married, he worked in the theater as a doorman, or whatever you call it, during the Depression when jobs were hard to get. And then he worked — later on, he went to barber college and had his own barber shop, and he's had one of those till he retired.

Q Were there any children from your marriage with the exception of Carol?

A Yes, one son.

Q And how old is he?

A He was just forty-eight.

Q So, a couple of years older than Carol?

A Um-hum.

Q Generally, are you and your husband in good health?

A Yes.

Q And how about Carol's brother?

A Carol's brother is, too, yes.

Q Can you tell us when Carol was born, please?

A Yes. She was born June 15th, 1937.

Q Did she reside with you in your home up until the time she got married?

A Yes.

Q Do you remember how old she was when she was married?

A Twenty years old.

Q Now, would you describe Carol as a problem child while she was growing up?

A No, she was no problem. She was very good in her school work, and she did very well in her grammar school and junior high school. Then when she — the last two years of her high school she got involved with — she was so popular and she had extra school activities, she was a cheerleader and in the pep club and all those things — and some of her school grades went down a small amount. But she still was a B and C student.

Q Was she an honor student before that?

A Yes.

Q And did she stay on the Dean's list when she was going through the rest of high school?

A Tumbled off a small amount. In the end, instead of getting As, she got Bs or Cs.

Q Was she active in intermural sports?

A Yes, softball team. And, like I said, she was a cheerleader. She was in the pep club and a couple of other clubs they had in school. Right now, I can't remember the names.

Q When did she meet Stan?

A She met Stan when she was a sophomore in high school.

Q What was he?

A I think a junior. And he was a football player.

Q Did they date during high school?

A In high school, yes, uh-huh.

Q And then — let me see if I've got it straight — did Stan then go into the military for a while?

A Yes, he did.

Q When he came out, did they date then?

A Yes.

Q And do you recall what year they were married?

A Carol was twenty, so it must have been '57.

Q Where did they live after they were married?

A They lived in South San Francisco. At the time they were married, we lived in South San Francisco, and they also lived there. I think that was Stan's home, too, before he was married.

Q Was Carol, after the time she was married and before Chrisann came along, employed outside of the home?

A Yes. She started to work for Swift Packing Company — they had an office there in South San Francisco — and she got a position with them, I think it was, two or three months after she graduated from high school. And she worked with them as a secretary until the time — just a few weeks after Chrisann was born, she left.

Q Did they eventually move down here in San Jose?

A Yes, they did. And I had come — I was transferred in my position down to San Jose, my husband had his barber shop down here, so we moved down here.

Q Now, Stan and Carol tried to have some children for a while.

A Yes, they did.

Q And did they ultimately decide to adopt children?

A Yes; that's correct.

Q Was Chrisann adopted back in September of 1965 —

A Right.

Q — when she was just an infant, right?

A Yes.

Q And Nichole was adopted five years later?

A Right, yes.

Q Were you in a position during the time that Carol was raising Chrisann and Nichole down here in San Jose that you could observe her skills as a homemaker, shopper and so forth?

A Yes.

Q Did you have a close relationship with your daughter?

A Yes, hu-huh.

Q Did you get over — maybe you can tell me how frequently did you see her, say, in five years or so after Chrisann came along?

A I was working at Valley Fair, and we were at each other's home all the time, you know, intermittently, weekends, whatever. And after that I was offered a position of traveling with the company, and I took that. So then I was only home on weekends, but I always spent Saturday with Carol and her girls.

Q Did you have occasion to observe her home and how it was kept?

A Yes, I did.

Q And can you tell us a little bit about that?

A Carol was a very good homemaker, and she and her children — she was very interested in her children. And later on when her children went to school, she was very closely connected with the school. She was very interested in everything that the children did, and she watched over them, and she was a good mother, in my opinion.

Q How about taking care of the house?

A Taking care of the house, Carol was a good housekeeper. She was always trying some way to decorate her home, she liked gardening, and she was learning how to cook well.

Q Did she start out pretty terrible with cooking?

A At first she wasn't too excited about cooking. And then with her friends she would learn all these new recipes and everything, and she enjoyed it. She was very popular with friends here in San Jose, and they had company over, friends over at the house, and they went over to the other friends' homes. So it was very congenial, and they enjoyed themselves.

Q You were here during the time that the physicians testified as to her condition in the hospital, how she progressed at Los Gatos, what she did at Valley Medical Center and so forth. Without taking you through it, would you agree that the testimony that they gave here was generally an accurate rendition of what happened to Carol?

A Yes.

Q Now, there's been some mention of a shoe box full of drugs. Did you ever see a shoe box at Carol's house which contained any pills, medication, drugs, over-the-counter remedies, et cetera?

A Yes, I did.

Q Can you tell me when you first saw that box?

A When I first saw that box was when — I think the first time that I saw it was when Stan came in and told me that the doctor at the hospital requested all of the medication that was at the home that Carol had taken. And he said that — I asked him what kind, and he said just whatever medication she had. So, not knowing what — everything that Carol is taking or whatever it was, I just went around and picked up everything I could find, whether it was Carol's or the children's, and I put it in this shoe box, and we took it to the hospital.

Q Was that the day of the arrest?

A No, because I was in Butte, Montana, when my husband called that morning at 8:30, and I was traveling for my company at that time. And he called the hotel, and they transferred his call over to the store, and he told me that Carol was in a coma. And so

I called my office and told them that I had to leave. And so I didn't get into San Jose until 9:00 that night.

Q Is that when you got the box and took it to the hospital?

A No, it wasn't till the next day.

Q Now, we have introduced into Evidence three packages of pills from Dr. Pyzer. Did you see those three packages in the box?

A Yes, I did.

Q Were there any other packages that you observed that looked like the packages that Jack has here that were in the box when you took it to the hospital?

A There were no other bags like this.

When I picked up all the medication I picked up over-the-counter drugs, headache, aspirin or whatever. I put everything in there. I think there was even a little thing of the — the pills that the little children were taking for their teeth.

Q Fluoride pills.

A Fluoride pills.

Q Was your interest at that time in getting the doctors every conceivable medication you could find in the house?

A Yes.

Q And did they —

A — but I didn't know what it was called or anything. When her husband said they wanted everything, I just put them all in, everything in the house.

Q Now, incidentally, when did Carol first start taking thyroid?

A Carol — she didn't take thyroid until — the first time I knew about her taking any thyroid is when she went to Dr. Jackson.

Q In about 1966?

A That's right.

Q Incidentally, I think Dr. Jackson mentioned yesterday that Carol had a sister who's hypothyroid.

A She has no sisters at all. Carol is my only daughter.

Q Did you hear Dr. Jackson make that —

A Yes, I heard that.

Q That wasn't my imagination.

A I heard that remark, too.

Q Have you taken thyroid?

A I had thyroid given to me at one time, and the doctor finally told me that I should have a test for it. I couldn't take it. I didn't need it.

Q When was that?

A My lord, this was when I first came to San Jose.

Q Carol came home eventually from the Valley Medical Center; is that right?

A Yes.

Q Would it be fair to state that from the initial period of time when she was home that she was incapable of doing anything for herself?

A That's true.

Q Eventually, as time went on, didn't she get better?

A She got better to the extent of she was able to walk around and she was able to do a few things. But as to her mental process, no, not too much.

Q Was there a period of about a year or so when she kind of leveled off and reached the status that she's at today?

A Right. That's true.

Q Have you been able to observe her? Do you see her frequently?

A Yes, I do.

Q Do you observe any difference in the way she attempts to keep house now and the way she did it before this arrest?

A Yes, there's a big difference.

Q Could you tell the Court and the ladies and gentlemen about it?

A Carol needs help to have her housework taken care of correctly. Her interest, if she's interrupted in doing anything she starts out to do, she doesn't remember what she was doing when she left. Like if someone came and rang the doorbell and she was washing dishes, she would go answer the door and then forget all about leaving the things out of the refrigerator. Her span of interest — is interest the word I want?

Q It's all yours.

A She cannot retain what she was thinking of or doing when she was interrupted. She has no — she doesn't make plans that she can follow through on. And so her house, therefore, they have to have someone come in to clean it, to keep the housework up, as much as it is. She has tried to wash clothes and do the laundry, but they have had more breakdowns with the washing machine and dryer since she has been there because she does not comprehend how to follow instructions.

The same way with her cooking. She has an awful time trying to retain the information that's in the recipe, and so, therefore, her cooking isn't very well done. And so her housework — her gardening outside — she doesn't have any interest in it whatsoever.

Q You indicated that Carol was kind of a social person when she went to high school.

A Yes, she was.

Q Did you observe that she and Stan had a pretty good social life prior to the time of the arrest?

A Yes.

Q What does her social life consist of now?

A She has only two friends that I know of that come to see her. And she — other people that she knew previous to her attack,

she will not talk to them, call them on the phone, invite them over. She feels that she doesn't know what to talk to — about to them. She cannot hold a conversation. She says that they wouldn't be interested in her now. She thinks that she's a dumbbell — they would think she was a dumbbell because she doesn't know how to carry on a conversation, she couldn't be interesting to them. So she just doesn't call anyone over, she doesn't invite them to her home.

Q Who were the friends that you mentioned, those two?

A She sees here?

Q Yes.

A She sees a girlfriend she used to know in high school that was her chum. This girlfriend sees her at least once or twice a year, but that's all. And then she has one friend that was a — I think she was previously a nurse — that comes over to see Carol, and I think Carol is closer to her than anyone because she tells her everything that happens to her, and she is very close to her. And that's the two friends that she has.

Q And have you observed Carol be depressed or anxious or upset?

A She gets very depressed and gets very upset. She can't take criticism of any kind. I have tried to help her, tell her she's doing something wrong, that she should do it a certain way, and she gets upset with me. If she's criticized for the way she does her housework she gets very upset, and she'll start raising her voice and hollering. That certainly isn't like she was before.

Q Do you have an opinion, seeing her on a frequent basis, as to whether any of these problem areas are improving or staying about the same or getting any worse as time goes on?

A I don't think they are, they are improving at all, not since she hit that certain level, and she hasn't improved since then.

MR. BRAZIER: I have no other questions.

CROSS-EXAMINATION

BY MR. FRISCH:

Q Mrs. Chames, is that pronounced correctly?

A Yes; that's right.

Q You took your daughter back in 1966 to Dr. Jackson; is that correct?

A Yes, uh-huh.

Q And was he your doctor prior to your taking her?

A Yes. I had seen him — I think the first time I saw him was when I had an attack — a bad cold — and I went to see him for bronchitis.

Q And did — in 1966 what was the purpose of your taking your daughter to see Dr. Jackson?

A I think that's when she fell down the stairs when she was carrying her daughter and she slipped down the stairway going down the stairs.

Q And who was her treating physician immediately before Dr. Jackson?

A She was — I don't even know the name of the doctor. They had moved down here. It was just not too long after that when this happened. I don't know the name of the doctor up in San Francisco that she went to.

Q During her teenage years, what doctor did you use as your family doctor?

A You know, I don't remember.

Q Do you remember any doctor that was used by your family or Carol prior to 1966?

A There was a medical building or doctors' building there when we were living in South San Francisco, about eight blocks away from home, and I used to take them there. But I can't remember the doctor's name.

Q Now, were you aware that your daughter was seeing Dr. Pyzer?

A No.

Q She never discussed —

A She did tell me — when I found out, when she did tell me about him, I told her she shouldn't go to see him.

Q When did you first learn from your daughter that she was seeing Dr. Pyzer?

A I couldn't tell you the date.

Q Year?

A I don't really remember.

Q Five years ago?

A I don't remember. I really don't.

Q You were very close to your daughter; isn't that true?

A Yes, I was.

Q And did your daughter feel that she was overweight?

A Oh, she used to feel that way every so often if she would go to get in a bathing suit or something. At that time, every one seemed to be on — her friends were on the thin side.

Q Did she ever discuss with you what medication she was taking?

A Not in regards to the diet pills or anything like that, no.

Q So you and your daughter never discussed anything about the weight control clinic; is that fair to say?

A When she told me that she was going to Dr. Pyzer, I told her she shouldn't go to him because I knew he wasn't a very good doctor.

Q How to you know that?

A Well, mostly — most of your diet doctors aren't that — where they give out pills and everything else — at least I

had found that out in reading up in the magazines and everything else, that they really didn't have a good reputation.

Q So you held the opinion that all weight reduction clinics were bad; is that fair to say?

A Especially if they gave you all the pills that you didn't know what were in them.

THE COURT: Excuse me just a minute. I'll be right back.

(Whereupon the Court left the courtroom and returned minutes later.)

MR. FRISCH: Could the reporter read back the last question?

(Whereupon the reporter read back the last question.)

THE WITNESS: No, not at all. The only thing I was against was the ones that gave out pills you didn't know what you were taking.

Q (by Mr. Frisch) Did you ever go to a weight control clinic yourself?

A Yes, I went to Dr. Pyzer at one time. But I was only there for a short time.

Q Now, when did you go to Dr. Pyzer?

A Oh, lord, I don't remember. I only went to him a couple of times.

Q Were you a patient of Dr. Pyzer at the time Carol had her heart attack?

A No.

Q Were you a patient of Dr. Pyzer prior to that point in time?

A It must have been the early — I came down here in — must have been after I came down here the first — '60, '61. I'm not sure.

Q '61? And how long did you see Dr. Pyzer?

A I really am not sure. I don't remember. Three or four visits. I'm not sure.

Q Would it be over a period of approximately a year?

A I don't even think it was that long.

Q Did he give you any prescriptions?

A No, he gave me pills like to — only little brown bags, at that time.

Q What were they?

A I don't know.

Q You weren't told?

A No.

Q Did you recommend Dr. Pyzer to Carol?

A I certainly did not.

A How did Carol happen to go to Dr. Pyzer when you had previously gone to Dr. Pyzer?

A I think it was through a friend of hers at that time.

Q Did Carol conceal from you the fact that she was going to Dr. Pyzer?

A I don't know whether she concealed it or not. It's just that I happened to hear her mention his name, and I think this is the way it happened, and that when I heard it I told her that she shouldn't go back to him.

Q And you don't remember when you gave her that advice?

A No, I don't.

Q All right. This shoe box that we're talking about, you gathered up medication from Carol's nightstand; isn't that true?

A I went to the nightstand?

Q Let's take them one at a time.

You gathered up medication from the nightstand in Carol's bedroom; isn't that true?

A I don't really remember if there was any medication on the nightstand. If there was, I was not sure what it was.

Q And you gathered up medication in the kitchen cupboard; is that correct?

A That's true.

Q And did you gather up medication from the bathroom medicine chest?

A Yes.

A And did it in fact fill the shoe box?

A No, it didn't fill the shoe box.

Q Did you hear the testimony of Dr. Jackson?

A Yes, I heard that.

Q And you disagree with the description of the shoe box being filled with medicine?

A That's right.

Q And you disagree with his description of what was contained in the box?

A I disagree with what he said was in the box, in the way that it was — besides these three bags there was also some vitamin pills and some cold tablets or headache pills, that type of thing.

Q Was there any Valium?

A Valium, no, not that I can recall.

Q Did your daughter ever take Valium?

A I have never heard her mention Valium.

Q But then she didn't tell you about thyroid, —

MR. BRAZIER: Objection; argumentative.

Q (by Mr. Frisch) — did she?

THE COURT: Go ahead. You can answer.

THE WITNESS: Answer which question?

MR. FRISCH: Will the reporter read back the question?

(Whereupon the reporter read back the last question.)

Q (by Mr. Frisch) Did she tell you she was taking thyroid?

A She mentioned thyroid, yes, hu-huh.

Q On more than one occasion?

A After she was given it by Dr. Jackson. That's all I know of.

Q So she mentioned she was receiving thyroid from Dr. Jackson?

A Right.

Q Did she mention she was receiving thyroid from Dr. Pyzer?

A No, but then she mentioned she didn't know what was in the pills, these pills of pink and brown or green pills.

Q Did you ever examine the medication that she was receiving from Dr. Pyzer?

A I did examine it, yes, when I put the bag in the box.

Q That was the first time you ever looked at the medication?

A Right. In fact, I was surprised at the containers they were in because I have never seen those before.

Q So you never saw any of Carol's medication until you put it in the shoe box?

A Right.

Q And she never discussed with you what medication she was given from Dr. Pyzer?

A I don't even think she knew.

Q Why would she say —

A She did not say.

THE COURT: Let me ask a question first, and then answer.

Did she say anything that indicated she either knew or did not know what she was getting from Dr. Pyzer?

THE WITNESS: She only showed me the pills that she was taking, but she did not know what the pills contained.

THE COURT: Before she went to the hospital, did she show you the pills?

THE WITNESS: No, sir. I wasn't home before she went to the hospital.

THE COURT: She showed you the pills after she went to the hospital; is that right?

THE WITNESS: No, sir.

THE COURT: Now, let's take it one more time. You just told me that some time she showed you some pills.

THE WITNESS: Yes, but that was —

THE COURT: I want to know when.

THE WITNESS: This was some time during the period before she had the attack. I don't know how long.

THE COURT: All right. Now, did she say anything at the time like I got these from Dr. Pyzer or words to that effect or where she told you where she got them?

THE WITNESS: She has some pills that she had to take, she forgot to take them. She said, I forgot to take my pills today, and she got them. But she had them in her hand or purse.

THE COURT: I'm trying to find out what she said.

THE WITNESS: She forgot to take her diet pills. But I don't know whether she knew or not what was in them.

THE COURT: You are assuming she didn't know?

THE WITNESS: Right.

THE COURT: Did Carol say anything about whether she knew or did not know?

THE WITNESS: No.

THE COURT: Thank you.

Q (by Mr. Frisch) Now, this was on just one occasion that you were aware of her taking diet pills or what you assume were diet pills?

A She had told me that she was going to Dr. Pyzer.

Q All right. Now, she told you she was going to Dr. Pyzer when?

A (No response)

Q She started, according to the record, going to see Dr. Pyzer in 1966. Did she tell you in 1966?

A I don't remember when she told me.

Q Did she tell you a long time ago?

A Well, it seemed like a long time ago now, but I don't know when she told me.

Q Did she tell you more than five years ago?

A I'm not sure.

Q All right. When she told you that she was going to Dr. Pyzer, did you tell her that you had been a patient of Dr. Pyzer?

A Yes.

Q And did you tell her what medication you took?

A I didn't know what medication I took. But I told her — that is when I gave her the advice of not going to him.

Q Do you know where she purchased her drugs?

A On her prescription?

Q Uh-huh.

A They were from Thrifty Drug.

Q Did she also purchase drugs from Payless?

A I'm not sure.

Q Did you used to drive with her occasionally to the drug store when she would get her supply?

A I drove with her to the drug store occasionally, but I don't remember her getting any specific things.

Q Did you hear the testimony yesterday of her regularly refilling her Synthyroid prescription from Dr. Jackson?

A Pardon me? What was your question?

Q Her regularly filling her prescription for Snythyroid from Dr. Jackson from 1966 forward. Did you hear that testimony?

A I heard the testimony, yes.

Q Now, on any of those occasions when she went to get her Synthyroid on a regular basis, did you go with her?

A I really don't have — I could have gone with her to the drug store, but I don't know if it was specifically for the refill or the prescription or whatever.

Q But you did go to the drug store with her?

A Right. Not all the time, but occasionally.

Q And did you ever discuss with her on any other occasions prior to her heart attack, except for the one you've already testified to, your concern of her going to a weight control clinic?

A I think I asked her one time — she mentioned something about it, and I said are you still taking those diet pills? But —

Q What did she say?

A She said once in a while she takes them. Certain ones she didn't like because they made her nervous.

Q So once in a while she would take from her selection of pills available?

A I don't know. That's what she said.

Q What did you say?

A I said she shouldn't be taking any of that.

Q And what did she say?

A It's not going to do her any good.

Q What did she say?

A I don't even know whether she answered me or not. It's been quite a while ago.

Q Now, this shoe box that Dr. Jackson described as being filled with pills, did you ever see it filled?

A I'm the one that filled it. But it wasn't filled.

Q Did you ever see it filled?

A See it filled?

Q Yes.

THE COURT: Full.

THE WITNESS: It wasn't filled when I picked up the medicines or whatever.

Q (by Mr. Frisch) But at any point in time subsequent to you collecting —

A No, I didn't see it after I handed it over to the hospital.

Q Did you hand the box over to the hospital — who did you give it to at the hospital?

A To the nurse that was at the —

Q The receptionist?

A No. She was in charge of the room where they kept — where Carol was in the hospital. It was the day after I got home. And they were monitoring her heartbeats and all that. I don't remember what it was.

Q So it's a day or two after Carol had been in the hospital, you brought the shoe box to the hospital?

A It was the day after.

Q The day after? Okay. Then when you brought it to the hospital the day after, was that at the request of Dr. Jackson?

A I'm not sure. I guess it was. I'm only guessing because her husband is the one — I was there with the children that evening. After he got home from the hospital, the next morning he said

that they wanted all of the pills at the hospital, that medication or whatever, that was in the house that Carol had been taking.

Q Okay. And you gathered it together, put it in the box?

A I gathered everything together because I wasn't sure what she's been taking.

Q All right. Fair enough. And you took it to the hospital, and you gave it to whom?

A The nurse at the desk there in that room.

Q Did you instruct the nurse as to where it was to go from there or who was to get it?

A I said that they requested it. I wasn't sure who had requested it because I wasn't even sure who was her doctor in charge of the case at that time. I was so upset.

Q That's understandable. Now, the problem, however, is that we're trying to trace what happened to the shoe box.

A I have no idea after it left my hands. I have no idea what happened to it.

Q Did you ever receive back from the hospital any of the drugs that were in the shoe box?

A I didn't.

Q Who did?

A I imagine it was her husband.

Q So the shoe box was returned with drugs in it to her husband?

A I don't know.

Q And then did you subsequently destroy those drugs that were in the box?

A I never saw it after that.

Q Did you ever flush any drugs down the drain?

A Myself, no.

MR. FRISCH: Your Honor, may we approach the bench?

(Whereupon, the following colloquy was held at the bench, out of the hearing of the Jury.)

MR. FRISCH: Your Honor, at the time of the arbitration she testified that the drugs that were picked up by Mr. Perry from the hospital, brought back home — she was so upset with the fact that — of the amount and numbers that she flushed them down the toilet. That was her testimony before the judge that heard the arbitration. If I'm bound not to bring up what was said at the arbitration, we have got a problem.

MR. BRAZIER: You might have a problem, but it's the rule.

THE COURT: Let's go off the record for a minute.

(Whereupon, a discussion was held off the record.)

THE COURT: The court will be in recess for a few minutes, about five minutes. The same admonition still stands for the jury not to talk.

(Whereupon, the following discussion was held in chambers during the recess:)

MR. BRAZIER: I think California Rules of Court, your Honor says — I can look it up pretty quick, if you'd like.

THE COURT: If you think you can find it, go ahead. The Rules are back here somewhere.

(Whereupon, Counsel hands book to the Court.)

THE COURT: According to the Rules of Court you can't use the evidence by way of impeachment or for any other purpose. You certainly have a very specific rule. So it looks like you're out of luck.

MR. FRISCH: Well, we all heard it certainly differently at the arbitration.

MR. BRAZIER: I wouldn't go that far.

MR. FRISCH: You didn't hear it?

MR. BRAZIER: I'm not under oath, but I didn't hear that testimony as you're accusing it. Whether I did or not is immaterial. The Rule is clear, Rule 1616.

THE COURT: Let's go back in and go back to work.

(Whereupon, the following proceedings were held in the courtroom in the presence of the Jury:)

THE COURT: Everybody is here. You may proceed.

Q (by Mr. Frisch) Is it your testimony that you never saw any of the contents of the box after you delivered it to the hospital?

A I believe that's true. I can't tell you for sure.

Q You can't tell me for sure? Did her husband Stan return the box to the home?

A I don't remember.

Q Did you ever discuss the contents of the shoe box with Stan after the both of you were back home?

A There must have been some talk about it.

Q Do you remember what was discussed? What did you say?

A I really don't remember. At that time, I was pretty upset, and I don't really remember exactly what I did or what I said.

Q You don't remember what you did or said in relation to the shoe box?

A Not completely, no.

Q Well, all I need is to know what you do recall. What happened to the shoe box?

MR. BRAZIER: Asked and answered now, I think, about four times.

THE COURT: Well, ask it again.

THE WITNESS: I really don't know.

Q (by Mr. Frisch) All right. Perhaps we could help you with your recollection if we tried to recall the whole incident of the shoe box, okay? Is that fair enough?

A (Witness nods head up and down)

Q You gathered the materials together and put them in the shoe box.

A Right.

Q And you gathered them from several sources.

A Yes.

Q And you yourself took the box down to the hospital in your car.

A Yes.

Q And was there anyone with you when you took the shoe box to the hospital?

A I don't know whether my husband could have been there. I don't know whether my daughter's husband was there. I'm not sure. All I know is I handed it to the nurse at the desk there.

Q And then how much time passed before the shoe box came back from the hospital.

A I don't know.

Q A couple of days?

A I realy don't know.

MR. FRISCH: I have no further questions.

MR. BRAZIER: No questions, Judge.

THE COURT: All right. Thank you.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA
No. 392577
CAROL PERRY AND STANLEY PERRY,
Plaintiffs,
vs.
LLOYD E. PYZER, M.D.,
Defendant.

MOTION TO REOPEN TRIAL FOR ADDITIONAL EVIDENCE [CCP § 607(6)]

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Attorneys for Defendant
Lloyd E. Pyzer

Lloyd E. Pyzer, defendant in the above entitled action moves the Court for a the setting aside of the submission of the case and for the reopening of the trial for the receipt of additional evidence.

This motion is made pursuant to CCP § 607(6) on the following grounds: evidence exists that the witness PEARL CHAMES made a statement prior to the trial which was inconsistent with her testimony at trial, a statement which will tend to prove that physical evidence in the possession of plaintiff was destroyed by the witness and made unavailable to defendant, and which will discredit her testimony at the trial.

This motion is based on the attached memorandum of points and authorities, the declaration of Francis E.X. Murphy, and on all the pleadings, records, and papers on file in this action.

Dated: January 30, 1984

FRANCIS E.X. MURPHY

POINTS AND AUTHORITIES

THE COURT SHOULD DEPART FROM STRICT COMPLIANCE WITH RULE 1616 HERE IN THE INTEREST OF JUSTICE

Rules of Court are promulgated by the Judicial Council pursuant to Article 6 Section 6 of the Constitution which directs:

> "To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, *not inconsistent with statute,* and perform other functions prescribed by statute" [emphasis supplied]. Prior to its amendment, the Constitution in Article 1 Section 1a, provided that the Council shall: "(5) Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or may hereafter be in force*" [emphasis supplied].

As put by Witkin, *California Procedure, Second Edition, Courts, § 131,* "There seems to be a general principle that rules of court are designed to accomplish the ends of justice, to protect rights and to implement the substantive law, and that, when they would operate to defeat these purposes, the court may depart from them "in the interest of justice to assure a fair trial of other determination 'on the merits'."

In *People v. Silva* (1898) 121 C 668, 670, 54 P 146 we find the powerful and lasting pronouncement that:

> "When strict observance of the rule would operate to defeat or impede justice it is always within the power of the court to suspend the rule, and it is its duty to do so".

In the case before this Court, the right of the defendant Pyzer to a fair trial on the merits is defeated if he is unable to present evidence which tends to prove perjury by plaintiff's mother, a witness at the trial. Where the prior inconsistent statement of the witness consists of testimony under oath at the earlier arbitration hearing and where that testimony disclosed that the witness had destroyed physical evidence, whereas her testimony at trial denied any such destruction, the withholding of this impeaching evidence from the jury works a substantial harm on defendant and may

directly affect the outcome of trial, since the jury is left to speculate on the nature and disposition of the physical evidence which has been alluded to in testimony of other witnesses.

Rule 1616 provides in part:

> "(c) The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial."

Rule 1616 is part of the rules formulated by the Judicial Council to comply with *Code of Civil Procdure § 1141.14,* which states:

> "Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter. [Stats.1978,c.473,§ 2,operative July 1, 1979.]

Yet in *Dickers v. Superior Court in and for Los Angeles County* (1948) 199 P2d 709, 88 CA2d 816, the Court stated:

> "While rules of court may facilitate business and promote convenience of litigants, acts essential to jurisdiction as fixed by statute may not be modified by rule, and *any rule that operates to deprive a party of a statutory right is to that extent void.*" [emphasis supplied].

and in *Albermont Petroleum Limited v. Cunningham* (1961) 9 CR 405, 186 CA2d 84, it was said,

> "Rules adopted by judicial council, *if they do not transcend legislative enactments,* have force of positive law and are as binding on the court and parties as procedural statutes." [emphasis supplied].

This is particularly important where essential rights of the parties are affected by the Rules, and the rule will be disregarded, as in *In re Robin M.* (1978) 21 C3d 337,346, 146 CR 352, 579 P2d 1, (detention of minor), but the rule will prevail where rights are preserved *In re Marriage of Lusk* (1978) 150 CR 63, 86 CA3d 228, (bifurcation of trial for issue of marital status and remaining issues).

The clear purpose of the restrictions set out in Rule 1616 is to comply with the statutory admonitions of CCP §§ 1141.11 et seq., which prohibit disclosure at trial directly or indirectly that there was any arbitration proceeding in the matter.

It is not necessary to make any mention of the arbitration hearing in which the prior inconsistent statement was made. The statement was indeed part of the evidence adduced at the hearing, but the statement has an independent significance which does not depend upon its having been evidence at the hearing. A fair trial for defendant Pyzer requires that the jury hear the statement.

The statute authorizing judicial arbitration is a temporary one. It will expire on January 1, 1986 unless it is extended. CCP § 1141.32. It and the Rules promulgated under it are subject to scrutiny and will be reported upon to the Governor and to the Legislature by the Judicial Council and the Auditor General. Modifications and revisions are to be expected as a matter of course.

The primary purpose of judicial arbitration is to improve the efficiency of the judicial system and to expedite the resolution of disputes. This goal should not be sought at the expense of the rights of the parties, or reached by abandoning the search for truth, and there is no indication that the legislature so intended.

THE PRIOR INCONSISTENT STATEMENT OF THE WITNESS MAY BE ADMITTED TO IMPEACH AND TO PROVE THE TRUTH OF THE MATTER STATED IN THE PRIOR STATEMENT.

Evidence Code § 1235 provides:

> "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsis-

> tent with his statement at the hearing and is offered in compliance with Section 770. (Stats.1965,c.299,§1235.)

and *Section 770* states:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action. (Stats.1965,c.299,§770.)

The *Law Revision Commission Comment to Section 770* states in part that:

> " . . . Where the interests of justice require it, the court may permit extrinsic evidence of an inconsistent statement to be admitted even though the witness has been excused and has had no opportunity to explain or deny the statement."
>
> Here the witness CHAMES has been excused, yet at trial she was fully afforded the opportunity to explain the circumstances surrounding the missing shoe box of medicine which at the arbitration hearing she admitted destroying. Absent a disclosure to the jury that the medications were so destroyed, its members will be left to their own speculations as to its fate. The interests of justice require that the evidence of the inconsistent statement be admitted.

Evidence of a prior inconsistent statement made in a criminal trial has been properly admitted for impeachment purposes in a later civil trial in federal court. *Davis v. Eide* (C A 1971) 439 F2d 1077, cert den 92 SCt 139, 404 US 843, 30 LEd2d 78. The use of the prior inconsistent statement to prove the truth of the matter stated in addition to impeachment is allowed under *People v. Strickland* (1974) 114 CR 632, 523 P2d 672, 11 C3d 946. (Prior inconsistent statement of witness may be admitted not only to impeach his credibility but also to prove the truth of the matters therein asserted), and where the witness takes refuge in forgetful-

ness, *People v. Burciago* (1978) 146 CR 236, 81 CA3d 151, cert denied 99 S Ct 1051, 439 US 1131, 59 LEd2d 92, permits the statement to be admitted because,

> "In normal circumstances, testimony of witness that he does not remember an event is not inconsistent with prior statements by him describing that event, but justice will not be promoted by ritualistic invocation of this rule of evidence; inconsistency in effect, rather than contradiciton in express terms, is test for admitting witness' prior statement, and same principle governs case of forgetful or reluctant witness.

Defendant Pyzer contends that exclusion of the prior inconsistent statement of witness CHAMES would amount to a ritualistic invocation of Rule 1616, for the reasons stated, and urges the Court to order that the trial be reopened for the purpose of receiving evidence of her prior inconsistent statement.

Dated: January 30, 1984

Respectfully submitted,

FRANCIS E.X. MURPHY

Attorney for Defendant
Lloyd E. Pyzer

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

No. 392577

CAROL PERRY and STANLEY PERRY,

Plaintiffs,

vs.

LLOYD E. PYZER, M.D.,

Defendant.

DECLARATION OF FRANCIS E.X. MURPHY IN SUPPORT OF MOTION TO REOPEN TRIAL

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Attorneys for Defendant
Lloyd E. Pyzer

I, Francis E.X. Murphy, say:

I am an attorney of record for defendant Lloyd E. Pyzer.

There is material oral evidence bearing on the issues in the case which defendant was prevented from introducing at the trial because the Court ruled inadmissable under Rule 1616 evidence of a prior inconsistent statement made by witness PEARL CHAMES. Said statement was made under oath in the arbitration hearing which preceded trial.

The oral evidence pertains to and tends to prove that the witness, mother of the plaintiff Carol Perry, destroyed physical evidence in her possession and control after this lawsuit was filed. It consists of testimony of the witness as refreshed by notice of her earlier testimony or the testimony of those in attendance at the arbitration hearing when she made the statement. Such testimony will be substantially as follows: the witness stated under oath on or about August 17, 1983, in the conference room of the

offices of Mr. Brazier, that she had destroyed all of the medication in a shoe box which she had earlier gathered up in the house of plaintiffs and delivered in said shoe box to Los Gatos Community Hospital, and which had been received back from the hospital. The statement contradicts her testimony at trial, which was that she had never seen the shoe box of medication after delivering it to the hospital in the first instance, and did not know what had become of it. The impeachment testimony will not disclose the fact that the prior statement was made in the course of the arbitration proceeding, or made any reference whatever to the existence of such arbitration proceeding.

All of such evidence is available for immediate introduction with the permission of the Court.

Executed at Los Gatos, Santa Clara County, California, on January 30, 1984.

I declare under penalty of perjury that the foregoing is true and correct.

FRANCIS E.X. MURPHY

APPENDIX E

Portion of Appellant's Opening Brief Before California Court of Appeal

AS APPLIED, RULE 1616 IS UNCONSTITUTIONAL

The purpose of the Rules of Court is to make for the efficient and lawful administration of justice. Rule 1616 sacrifices justice for efficiency.

The Rules of Court are promulgated by the Judicial Council pursuant to Article 6, Section 6 of the California Constitution, which directs:

> "To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, *not inconsistent with statute,* and perform the functions prescribed by statute." [emphasis supplied]

The requirement that Rules conform to statute came earlier. Prior to its amendment, the Constitution, in Article 1 Section 1a, provided that the Council shall:

> "(5) Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or may hereafter be in force".* [emphasis supplied]

Rule 1616 is not in accord with statute. Evidence Code Section 351 states that, except as otherwise provided by statute, all relevant evidence is admissible. Section 210 defines relevant evidence as: "evidence, *including evidence relevant to the credibility of a witness* or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [emphasis supplied]

It follows that a rule of court which bars evidence relevant to the credibility of a witness is to that extent void. The rule is inconsistent with the provisions of the evidence code and its enactment was therefore ultra vires. In *Albermont Petroleum Limited v. Cunningham* (1961) 186 Cal. App. 2d 84, 9 Cal. Rptr. 405, it was said, "Rules adopted by judicial council, *if they do not transcend legislative enactments,* have force of positive law and

are as binding on the court and parties as procedural statutes." [emphasis supplied]. Where the rule purports to transcend statute, it must perforce be ignored.

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS BY THE COURT'S RULING

When a party is prevented from bringing out prior inconsistent statements of an opposition witness, the door to perjury is opened. When a defendant is prevented from proving that the mother of the plaintiff destroyed evidence, he is deprived of his Fourteenth Amendment due process right. Counsel for the defendant contended at trial that the right of the defendant to a fair trial on the merits was defeated if he was unable to present evidence which tended to prove perjury by the plaintiff's mother and her destruction of physical evidence (C. 19-26). The rule should have been disregarded, as in *In re Robin M.* (1978) 21 Cal.3d 337, 346, 146 Cal. Rptr 352, (detention of minor).

Perjury of a witness destroys due process. This question has been faced in cases in which a criminal defendant contemplates perjury and conceals facts from counsel. The Constitution does not recognize the dilemma facing the client who decides that preservation of his freedom to lie under oath is more important than full disclosure to counsel, and who later suffers the consequences; the Constitution does not guarantee a criminal defendant a right to testify falsely *Harris v. New York,* 401 U.S. 222, 225 (1971). "(W)hen defendants testify, they must testify truthfully or suffer the consequences." *United States v. Havens,* 446 U.S. 620 at 626 (1980). "No lawyer will have knowingly participated in presenting perjured testimony. That is, in and of itself, a matter of crucial importance to the legal system's goal of seeking the truth" (*Havens* at 626). Unfortunately, plaintiff's lawyers stood silent when defense counsel told the trial judge that they were competent witnesses for impeachment testimony. No counsel for the plaintiff, neither Mr. Brazier nor Mr. Walker, disputed defense counsel's assertion that they, as well as both defense counsel, could testify to the fact of the prior inconsistent testimony of the witness Chames (R. Gorley 1/10-3/8). They took refuge in the Rule. Strict application of Rule 1616 will open the

door to perjury and invite affected parties to depart selectively from testimony given in arbitration where that testimony is uncomfortable for them. The jury at a trial de novo will be none the wiser, but justice will be ill served.

CONCLUSION

In summary, it is clear that the trial court erred in refusing to allow impeachment of the witness Chames, that the error caused substantial prejudice to defendant in that he was unable to present a complete defense and was thereby deprived of due process, and the system of justice was perverted in providing the witness the refuge of Rule 1616.

WHEREFORE, defendant prays that this Court reverse the judgment from which this appeal was taken.

FRANCIS E.X. MURPHY
Attorney for Appellant

APPENDIX F

Trial Court Judgment On Special Verdict

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

No. 392577

CAROL PERRY, ET AL.,
Plaintiffs,
vs.
LLOYD E. PYZER, M.D., et al.,
Defendants.

JUDGMENT ON SPECIAL VERDICT

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Attorney for Plaintiffs,
Carol Perry and Stanley Perry

This action came on regularly for trial on January 23, 1984 in Department 2 of the above-entitled Court, the Honorable Bruce Allen, Judge presiding; the Plaintiffs, CAROL PERRY and STANLEY PERRY appearing by POPELKA, ALLARD, McCOWAN & JONES through their attorneys Thomas S. Brazier and Paul R. Walker; the Defendant, LLOYD E. PYZER, M.D. appearing by his attorneys Floyd C. Frisch and Francis Murphy.

A jury of twelve persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into Court with its verdict consisting of the following special verdict submitted to the jury and the answers given thereto by the jury:

We, the jury in the above-entitled case, find the following Special Verdict on the issues submitted to us:

ISSUE NO. 1: Was the Defendant, LLOYD E. PYZER, M.D., negligent?

Answer "yes" or "no."

Answer: YES

If you have answered ISSUE NO. 1 "yes," then answer the next issue.

ISSUE NO. 2: Was the negligence of Defendant, LLOYD E. PYZER, M.D., a legal cause of injury to the plaintiff?

Answer "yes" or "no."

Answer: YES

If you have answered both ISSUE NO. 1 and ISSUE NO. 2 "yes," also answer the next issue.

ISSUE NO. 3: Was the Plaintiff, CAROL PERRY negligent? Answer "yes" or "no."

Answer: YES

If you have answered ISSUE NO. 3 "yes," answer the next issue.

ISSUE NO. 4: Did the negligence of Plaintiff, CAROL PERRY contribute as a legal cause to her injury?

Answer "yes" or "no."

Answer: YES

If you have answered both ISSUE NO. 1 and ISSUE NO. 2 "yes," then answer the next issue.

ISSUE NO. 5: Was Plaintiff, STANLEY PERRY negligent?

Answer "yes" or "no".

Answer: YES

If you have answered ISSUE NO. 5. "yes," then answer the next issue.

ISSUE NO. 6: Did the negligence of Plaintiff, STANLEY PERRY contribute as a legal cause to the Plaintiff, CAROL PERRY's injury?

Answer "yes" or "no".

Answer: NO

If you have answered "yes" to both ISSUE NO. 1 and ISSUE NO. 2, then answer the next issue.

ISSUE NO. 7: Without taking into consideration the question of reduction of damages due to the negligence of Plaintiff, CAROL PERRY, if any, and/or the negligence of Plaintiff, STANLEY PERRY, if any, what is the total amount of damages suffered by Plaintiff, CAROL PERRY and by Plaintiff, STANLEY PERRY, a legal cause of which was the incident in question?

Answer: As to Plaintiff, CAROL PERRY $1,083,178.84
As to Plaintiff, STANLEY PERRY $30,000.00

If you have answered ISSUES NO. 1 and 2 as "yes," and if you have answered ISSUES NO. 3 and 4 as "yes," and/or ISSUES NO. 5 and 6 as "yes," then answer the next issue.

ISSUE NO. 8: Assuming that 100% represents the combined negligence of Plaintiff, CAROL PERRY and Plaintiff, STANLEY PERRY, and of Defendant, LLOYD E. PYZER, M.D., whose negligence contributed as a legal cause of Plaintiff, CAROL PERRY's injury and/or Plaintiff, STANLEY PERRY's injury, what proportion of such combined negligence is attributable to Plaintiff, CAROL PERRY and/or to Plaintiff, STANLEY PERRY on the one hand and what proportion is attributable to Defendant, LLOYD E. PYZER, M.D. on the other hand?

Answer: to Plaintiff, CAROL PERRY 55%
To Plaintiff, STANLEY PERRY 0%
To Defendant, LLOYD E. PYZER, M.D. 45%

If you have answered ISSUES NO. 1 and 2 as "yes," answer the next issue.

ISSUE NO. 9: We the jury find in favor of Plaintiff and fix punitive damages in the amount of:

For Plaintiff, CAROL PERRY $ -0-

For Plaintiff, STANLEY PERRY$ -0-

It appearing that by reason of said special verdict:

Plaintiff, CAROL PERRY is entitled to judgment against Defendant, LLOYD E. PYZER, M.D., in the amount of $487,430.48, less the amount of $235,247.00 paid as settlement by Defendant PETER E. JACKSON, M.D., for a total net judgment of $252,183.48 with interest thereon as allowed by law plus costs of suit.

Plaintiff, STANLEY PERRY is entitled to judgment against Defendant, LLOYD E. PYZER, M.D., in the amount of $30,000.00 less the amount of $25,000.00 paid as settlement by Defendant, PETER E. JACKSON, M.D. for a total net judgment of $5,000.00 with interest thereon as allowed by law plus costs of suit.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That Plaintiff, CAROL PERRY, have judgment against Defendant, LLOYD E. PYZER, M.D., for the sum of $252,183.48 with interest thereon at the rate of 10% per annum;

That Plaintiff, STANLEY PERRY, have judgment against Defendant, LLOYD E. PYZER, M.D. for the sum of $5,000.00 with interest thereon at the rate of 10% per annum;

That Plaintiffs, CAROL PERRY and STANLEY PERRY have judgment for costs of $2,071.78 with interest thereon at 10% per annum.

DATED: May 7, 1984

BRUCE F. ALLEN
Judge, Superior Court

APPENDIX G

Partial Transcript of Proceedings in Chambers at Trial.

San Jose, California January 30, 1984

Proceedings

(Whereupon, The following proceedings were had in chambers.)

The Court: Okay. Let's see, Mr. Frisch, you want more evidence.

What is it you have?

Mr. Murphy: Yes, Your Honor. We would like to introduce evidence to impeach the testimony of Mrs. Chames, the plaintiff's mother who testified on the stand that she had no recollection of having seen the box of medication after it was returned from the hospital and —

The Court: Do you have a witness, a transcript or what?

Mr. Murphy: No. I can testify to it. Mr. Frisch can testify to it. Mr. Brazier can testify to it. So can Mr. Walker.

The Court: Yes.

Mr. Murphy: That she testified at an earlier time — we need not disclose the facts — It was an arbitration hearing — but she did testify at the earlier time in August of last year that when the box of medication was returned from the hospital it was in the Perry home. That she took it at that time, flushed the medication down the toilet.

The Court: Well, that's not what she said here. But the code — the rules say you can't refer to the testimony.

Mr. Murphy: That's correct, Your Honor, and I would — I would refer the Court to our points and authorities and strongly request the Court to consider the background of the rules, the background of the legislation that authorizes the rules, and

recognize that in the appropriate circumstance the rule should be ignored and the other statutory rights of the parties be preserved.

Mr. Brazier: If I can be heard on that just briefly, Your Honor, the rules are clear and by opening up arbitration to scrutiny in the trial court it would open up a can of worms we would never get closed up again.

The Court: I personally think the rule is wrong. The — The Court ordered non-binding arbitration was started here in this county in 1975 by me. First county in the state that started using it. It was adopted from the practice used in Cleveland, Ohio.

The legislature came through a few years later. Found it was successful here and provided a statutory framework and the judicial counsel adopted the rules and, as far as I know, they never talked to anybody in this county about their practice.

And they created their own system. But a rule is a rule and I don't see it's inconsistent with any statute.

They want the arbitration proceedings to be conducted that way. I think the rule is valid.

So the motion is denied.

Mr. Murphy: But Your Honor has had an opportunity to see our points and authorities —

The Court: Yes.

Mr. Murphy: And recognizes all the arguments we put therein.

The Court: Yes.

No. 86-1456

Supreme Court, U.S.
FILED
APR 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

DORIS L. PYZER, Executrix of the Estate of
LLOYD E. PYZER, M.D.,
Appellant,

vs.

CAROL PERRY and STANLEY PERRY,
Appellees.

On Appeal From the Court of Appeal of the State of California

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA

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No. 86-1456

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DORIS L. PYZER, Executrix of the Estate of
LLOYD E. PYZER, M.D.,
Appellant,

vs.

CAROL PERRY and STANLEY PERRY,
Appellees.

On Appeal From the Court of Appeal of the State of California

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA

Appellees, Carol Perry and Stanley Perry, bring this Motion to Dismiss the Appeal of Doris L. Pyzer, Executrix of the Estate of Lloyd E. Pyzer, M.D. The appeal is from the final judgment of the California Court of Appeals, First Appellate District, Division 4, dated September 17, 1986, denied review by the California Supreme Court on December 10, 1986.

Dismissal should be granted pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States on the grounds that: 1) the judgment rests upon adequate non-federal bases; 2) the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on; 3) the federal questions are not substantial.

OPINIONS BELOW

The opinion of the California Court of Appeal for the First Appellate District, Division Four, which appears in the appendix to appellant's Jurisdictional Statement, at p. A-1, is not reported.[1]

The denial of review by the California Supreme Court is not reported. (appellant's app. B-1).

STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

> No state . . . shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, Section 7:

> (a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.

California Constitution, Article VI, Section 6:

> To improve the administration of justice, the counsel shall . . . adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform the functions described by statute.

California Constitution, Article VI, Section 13:

> No judgment shall be set aside, or new trial granted, in any cause on the ground of misdirection of the jury or of the improper admission or rejection of evidence, or any error as to the manner of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that

---

[1] All references hereinafter to "appellant's app." refer to the appendices, A through G, inclusive, set forth in appellant's Jurisdictional Statement filed before this Court. All references hereinafter to "appellee's app." refer to the appendices, A and B, set forth herein.

the error complained of has resulted in a miscarriage of justice.

California Code of Civil Procedure, Section 1141.14:

Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter.

California Evidence Code, Section 351:

Except as otherwise provided by statute, all relevant evidence is admissible.

Rule 16.1(b), Rules of the Supreme Court of the United States

The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

Rule 1612, California Rules of Court:

The parties to the arbitration shall have the parties to take depositions and to obtain discovery and to that end may exercise all the rights, remedies, and procedures, and shall be subject to the same duties, liabilities and obligations as provided in Part 4, Title 3, Chapter 3 of the Code of Civil Procedure, except that all discovery shall be completed not later than 15 days prior to the date set for the arbitration hearing unless the court, upon a showing of due cause, makes an order granting an extension of time within which discovery must be completed.

Rule 1616(c), California Rules of Court:

The case shall be tried as though no arbitration proceedings have occurred. No reference may be made during trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration

hearing, or to any other respect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, or by way of impeachment, or for any other purpose at the trial.

STATEMENT OF THE CASE

This Appeal arises from a medical malpractice action filed against Lloyd E. Pyzer, M.D. Appellee Carol Perry suffered a cardiac arrest with permanent brain damage as a result of unidentified "diet pills", including amphetamines, barbiturates, thyroid hormones and other substances, routinely dispensed by Dr. Pyzer at his weight clinic.

Appellant stipulated to Judicial Arbitration. The matter was heard by retired Judge Peter Anello who awarded $750,000.00 damages against Dr. Pyzer. Appellant rejected the award and sought a trial de novo.

The central issue at trial was whether Dr. Pyzer was negligent either in treating Carol Perry or in failing to disclose the nature of the diet pills dispensed to her. By special verdict, the jury determined that Dr. Pyzer was negligent and that this negligence was a legal cause of injury. (appellant's app. F1-4).

At the trial, Pearl Chames, Carol Perry's mother, testified that she collected various medications from the Perry household and took them to the hospital but she did not know of the location or whereabouts of the drugs or the shoe box thereafter. (appellant's app. C6-7; 20-21).

Appellant contended that, at the arbitration hearing, Ms. Chames had testified that the shoe box was returned and she flushed some of the drugs away. (appellant's app. C-22). However, there is no record of the testimony during the arbitration hearing.

The trial judge held that Rule 1616(c) of the California Rules of Court precluded use of arbitration testimony for impeachment or any other purpose (appellant's app. G-2). No objection was made by appellant on *any* constitutional ground at trial.

Appellant brought a motion to reopen the trial for additional evidence on the grounds that the purported prior statement was admissible to impeach the witness and further, that he would be denied a fair trial unless the court departed from strict compliance with Rule 1616(c). (appellant's app. D1-6). Again, no constitutional objection was urged by appellant. The motion was denied.

In an unsuccessful appeal to the California Court of Appeal, appellant argued that the trial court had discretion to suspend operation of Rule 1616(c) and should have done so. He also argued that Rule 1616(c) violated Article VI, Section 6, of the California Constitution because it was inconsistent with statute, specifically California Evidence Code Section 351. For the first time appellant appeared to argue briefly that he had been deprived of due process under the Fourteenth Amendment. (appellee's app. A7-8).

The Court of Appeal affirmed the Trial Court's judgment under two independent bases: 1) Rule 1616(c) was valid as enacted by the Judicial Council pursuant to statutory authority; 2) even assuming error, there was no miscarriage of justice or prejudice to appellant. (appellant's app. A1-8).

Appellant then petitioned the California Supreme Court for review, arguing again that Rule 1616(c) was unconstitutional because it purported to modify Evidence Code Section 351 without statutory authority. For the first time, Appellant urged that Rule 1616(c) violated the Fourteenth Amendment equal protection clause. (appellee's app. B5-6). The petition for review was denied. (appellant's app. B-1).

SUMMARY OF ARGUMENT

This court lacks jurisdiction over this appeal because the judgment rests upon adequate non-federal bases; the federal questions were not properly raised or passed upon; and, no substantial federal question is presented. Dismissal is warranted for each of these reasons.

ARGUMENT

I

THE CALIFORNIA SUPERIOR COURT JUDGMENT RESTS UPON ADEQUATE NON-FEDERAL BASES

This Court has long adhered to the principal that it will not review state court judgments which rest upon independent and adequate state grounds, even where those judgments also decide federal questions. *Henry v. State of Mississippi* 379 U.S. 443, 446 (1965); *Herb v. Pitcairn* 324 U.S. 117 (1945).

> "The reason is . . . found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. *We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn,* 324 U.S. 117, 125-126. (emphasis supplied)."

In the instant case, the California Court of Appeal relied upon both Article VI, Section 6, and Article VI, Section 13, of the California Constitution as independently supporting their affirmation of the trial judgment. The Court of Appeal held that Rule 1616(c), California Rules of Court, was adopted by the Judicial Council pursuant to statutory authority. This follows the mandate of Article VI, Section 6, of the California Constitution that the council adopt rules for court administration, practice and procedure. The Court of Appeal separately held that, even assuming error by the trial court in applying Rule 1616(c), there was no miscarriage of justice or prejudice to appellant sufficient to grant his appeal under the California Constitution, Article VI, Section 13. (appellant's app. A1-8).

No federal ground was considered by the California Court of Appeal. The non-federal grounds relied upon fully, clearly, and rationally support the opinion. As there are adequate and inde-

pendent state grounds for the judgment, the Court should not review the federal questions raised by appellant.

II

THE STATE COURTS DID NOT EXPRESSLY PASS ON THE FEDERAL QUESTIONS WHICH APPELLANT FAILED TO PRESENT OR PRESERVE

It has been repeatedly held that this Court has no jurisdiction to review state court decisions unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, appellate jurisdiction fails. *Cardinale v. Louisiana* 394 U.S. 437, 438 (1969).

Further, where the highest state court has failed to pass upon a federal question, it is presumed that the omission was due to want of proper presentation unless the aggrieved party can affirmatively show the contrary. *Webb v. Webb* 451 U.S. 493 (1981); *Street v. New York* 394 U.S. 576, 582 (1969).

There are both policy and practical reasons for this rule. The principal of comity requires that a federal challenge to a state statute or official act be presented first to the state court. Further, this enables the court to develop an adequate record, identify any independent and adequate state grounds for the decision, and possibly construe the statutes so as to avoid or obviate the federal constitutional challenge. Failure to comply strictly with these requirements precludes review of the federal question by this court. *Webb v. Webb* 451 U.S. 493 (1981).

A. The Federal Questions Were Not Timely or Properly Raised

In *Webb v. Webb*, the court held that the bare references to "full and faith and credit" were insufficient to raise a federal question, stating:

> At a minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal Constitution was presented to the state courts and that those courts were appraised at the nature of substance of the Federal Claim at the time and in the manner required by the State law. 451 U.S. 493, 501.

In this case, appellant made no objection or protest based any constitutional protection at the trial court level. No assertion was made that the due process or equal protection clauses of the United States Constitution were violated. To the contrary, appellant's arguments were primarily directed to Article VI, Section 6, of the California Constitution which provides for court administration and procedures. Appellant also failed to rely upon Article I, Section 7, of the California Constitution, which provides, in pertinent part:

> (a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws.

In affirming the judgment of the Superior Court, the Court of Appeal relied upon the extensive portion of appellant's Opening Brief which was directed towards issues raised under procedural mandates of the California Constitution or statutes.

In California, an appellate court will ordinarily not consider procedural defects or erroneous rulings in conjunction with relief sought or defenses asserted, where a specific ground could have been, but was not, presented to the lower court. (*See, e.g., Eason v. Dickson* 390 F.2d 585, 589 (9th Cir. 1968), *cert. denied,* 392 U.S. 914 (1968); *Dimmick v. Dimmick* 58 Cal.2d 417, 422, 374 P.2d 824 (1962); *Sommer v. Martin* 55 Cal.App. 603, 610, 204 P.33 (1921).

> Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence.... The law casts upon the party the duty of looking after his legal rights.... If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal. (citation). *Sommer v. Martin, supra,* 55 Cal.App. 603, 610.

This is true for any constitutional question later urged on appeal. It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest possible opportunity or it

will be considered as waived. *Jenner v. City Council* 164 Cal.App.2d 490, 498, 331 P.2d 176 (1958).

No Fourteenth Amendment due process agreement was urged until appeal to the Court of Appeal. The Fourteenth Amendment equal protection clause was not asserted until appellant petitioned the California Supreme Court for review.

Appellant's failure to raise the federal issues in a timely and proper manner precludes review of these questions by this Court.

B. The Federal Questions Were Not Expressly Passed On By the California Superior Court, Court of Appeal, or Supreme Court

Since the federal constitutional issues were not raised in appellant's Motion to Reopen the Trial, it follows that the trial court had no opportunity to consider these issues.

In dismissing appellant's appeal, the California Court of Appeal stated that Rule 1616 (c) was valid under the California Constitution, Article VI, Section 6, because it was consistent with Evidence Code Section 351 and properly enacted pursuant to California Code of Civil Procedure Section 1141.14.

The Court of Appeal also relied upon Article VI, Section 13, of the California Constitution in holding that, in any event, the exclusion of the arbitration testimony did not result in a miscarriage of justice or prejudice to appellant so as to warrant setting aside the judgment or granting a new trial.

The California Court of Appeal does not ever refer to the federal due process issue, let alone make any decision in this regard. Since the equal protection issue was not presented to the California Court of Appeal, the decision cannot be viewed as even an implicit ruling on this question. (appellant's app. A1-8).

Although appellant raised the due process and equal protection issues in his Petition for Review to the California Supreme Court, review was denied without providing any reasons. While appellant may argue that this renders the decision ambiguous and therefore, it could be viewed as implicitly deciding the federal constitutional questions, this court should choose an interpretation that does not

raise a constitutional question. *Black v. Cutter Laboratories* 351 U.S. 292 (1956). Since the denial of the Petition for Review could be based on either of the grounds set forth in the opinion of the California Court of Appeal, there is nothing on the record to suggest that the California Supreme Court even considered the federal constitutional issues.

III

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED TO THE UNITED STATES SUPREME COURT

The lack of substantial federal question deprives this Court of jurisdiction to review this appeal. *Rice v. Sioux City Memorial Park Cemetery, Inc.* 349 U.S. 70 (1955) (writ of certiorari); *Equitable Life Assurance Society v. Brown* 187 U.S. 308, 311 (1902).

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes an evasion. *Rice v. Sioux City,* 349 U.S. 70, 73-74.

Although appellant here seeks to present what is, perhaps, an interesting abstract issue, no substantial federal question is presented. No due process or equal protection argument has been passed on by the California state courts which, instead, relied upon fully adequate non-federal grounds. This Court should thus avoid considering any constitutional assertion. *Black v. Cutter Laboratories, supra.* It is also clear that the California state statutes and court rules in question do not go beyond the range of

state action allowed by the Fourteenth Amendment. (*See, Martin v. Walton* 368 U.S. 25 (1961)).

The California Court of Appeal found that strong public policy supports the exclusion of evidence of testimony taken during arbitration. It also recognized an express legislative intent to keep judicial arbitration as informal and private as possible. (appellant's app. A5-7).

Here, appellant not only failed to properly raise any federal question at the trial level, appellant failed to properly provide any proper offer of proof or to *voir dire* the witness, Pearl Chames. No record exists of the arbitration proceeding. Appellant further failed to examine or cross-examine any other witness concerning the contents and whereabouts of the shoebox of medication in question. Appellant did not conduct any pre-trial discovery on this point.

Appellant elected to accept arbitration. California state courts have upheld and encouraged the use of arbitration based on strong public policy as expressed by the California legislature. The affirmation of judgment by the California Court of Appeal and denial of review by the California Supreme Court are correct. Dismissal should be granted as appellant has failed to suggest any substantial federal question adequate for this court to grant jurisdiction.

CONCLUSION

Although appellant seeks review of federal questions pertaining to the Fourteenth Amendment due process and equal protection clauses, these issues were not timely or properly raised and were not expressly passed on by the state courts below. The judgment of the trial court rests upon adequate non-federal bases fully supported by strong, rational public policy. No substantial federal question is presented. For each of these reasons, this Court lacks jurisdiction to review the federal questions offered and accordingly, appellees respectfully request that the appeal be dismissed

Dated: April 6, 1987

POPELKA, ALLARD, MCCOWAN & JONES

By THOMAS BRAZIER
Attorney for Appellees

(Appendices follow)

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Appendix A

Civil A028061
In the Court of Appeal
of the
State of California
Sixth Appellate District
Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the Estate of
Lloyd E. Pyzer, M.D.,
Defendant and Appellant.

Appellant's Opening Brief
On Appeal from the Judgment of the
Superior Court of California
Santa Clara County
The Honorable Bruce F. Allen, Judge

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STATEMENT OF THE CASE

This is an appeal from a judgment in a medical malpractice case in which the judge ruled at trial that evidence of prior testimony of a witness which was made in the course of an arbitration hearing in the same case could not be admitted to impeach the witness. The judge followed Rule 1616 of the Rules of Court in so ruling. The witness, the mother of the plaintiff and a major witness for the plaintiff, earlier testified that she had destroyed a quantity of medication. The part of the medication which was preserved was introduced at trial against the defendant. At trial the witness denied destroying the medication. The defendant was substantially prejudiced thereby. Appellant contends that the judge had discretion, even a duty, to suspend the operation of Rule 1616, and that his failure to permit the impeaching evidence to come in was an abuse of that discretion and a breach of that duty, calling for a reversal of the judgment taken against appellant and a remand for new trial. Appellant further contends that as applied, Rule 1616 is unconstitutional and void, as it was made by the Judicial Council acting in excess of its authority, and that the defendant's right to due process was invaded by such application.

THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OFFERED TO IMPEACH PLAINTIFF'S WITNESS

When the trial judge ruled that impeaching evidence could not come in against the witness Chames, he did so feeling that he was bound to follow Rule 1616, although he was in disagreement with it. (R. Gorley 2/14). A rule is a rule, he said. He had been informed that the witness had testified in the prior arbitration hearing that she had received back a shoe box filled with drugs and that she had destroyed the contents of the box, except for three envelopes identified with the defendant physician, which were already in evidence. (R. Evans 28/7), (C. 19-26).

Rule 1616 provides in pertinent part that, at a trial de novo:

> "(c) The case shall be tried as though no arbitration proceedings had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings, and none of the foregoing may be used as affirmative evidence, *or by way of impeachment*, or for any other purpose at the trial." [emphasis supplied] [1]

The trial judge had discretion to suspend operation of Rule 1616 and in the interest of justice, he was bound to do so. Without the impeaching testimony, the jury was left in ignorance of the witness' destruction of the box of drugs, and unable to relate that fact to the case. In the early case of *People v. Silva* (1898) 121 Cal. 668, 670, 54 P. 146, we find the powerful and lasting pronouncement that "When strict observance of the rule would

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[1] The Federal Rule is otherwise. Rule 500-7(b) for the Northern District of California provides as follows:
Trial De Novo (b) *Limitation on Evidence.* At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, *except that statements made by a witness at the arbitration hearing may be used for impeachment only.* [emphasis supplied]

operate to defeat or impede justice it is always within the power of the court to suspend the rule, and it is its duty to do so."

Rule 1616 is part of the rules formulated by the Judicial Council to comply with *Code of Civil Procedure § 1141.14*, which states:

> "Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter. [Stats. 1979, c.473, § 2, operative July 1, 1979.]

Yet in *Dikkers v. Superior Court in and for Los Angeles County* (1948) 88 Cal. App.2d 816, 199 P. 2d 709, the Court stated: "While rules of court may facilitate business and promote convenience of litigants, acts essential to jurisdiction as fixed by statute may not be modified by rule, and *any rule that operates to deprive a party of a statutory right is to that extent void.*" [emphasis supplied]

Clearly the purpose of the restrictions set out in Rule 1616 were to comply with the statutory admonitions of CCP §§ 1141.11 et seq, which prohibit disclosure at trial, directly or indirectly, that there was any arbitration proceeding in the matter. Accordingly, counsel pointed out to the trial judge that it was not necessary to make any mention of the arbitration hearing in which the inconsistent statement was made, and argued that the earlier testimony had independent significance which did not depend upon its having been part of an arbitration hearing, and that the defendant could not obtain a fair trial unless the jury had an opportunity to hear the earlier statements. Nevertheless, the impeaching testimony was excluded. (R. Gorley 2/14)

THE DEFENDANT WAS SEVERELY PREJUDICED BY HIS INABILITY TO IMPEACH THE WITNESS

Witness Chames was the mother of plaintiff Carol Perry (R. Evans 4/19-21). She testified as to the plaintiff's childhood, her achievements and activities in school, her employment and her married life (R. Evans 5-10). She testified further to the

profound effect of the cardiac arrest upon the personality and the daily life of the plaintiff (R. Evans 13-16). Her testimony also revealed her dislike for the defendant, to the degree that she warned her daughter not to go to him because he wasn't a very good doctor (R. Evans 17,18).

When Chames testified under cross examination that she had not destroyed the medications received back from the hospital, even that she had not even seen them (R. Evans 26-28), defense counsel were nonplussed. The shoe box full of medication which had been gathered up by the witness Chames in her daughter's house had early been a focus of the defense rationale (C. 7,8), and it was important that the jury see that the fact that the plaintiff had stockpiled prescription medication from both of the physicians treating her, and that her mother had destroyed all of it except the three envelopes in evidence, raised serious questions about the causal chain that led up to the cardiac arrest itself as well as potentially damaging the credibility of this witness. The amount, nature and source of the medications found in the plaintiff's home could disclose additional alternative possibilities for the true cause of her injury. There was a conflict in the evidence as to the contents of the shoe box (R. Gorley 108/25). How that conflict was resolved would bear heavily on the posture of the case for the jury. The Smith Kline laboratory report showed that upon admission to the hospital the plaintiff had barbiturates in her blood, above the therapeutic level, and that the gas chromatograph showed a "spike" for an unidentified substance (R. Gorley 78,79). A test by another laboratory picked up amephetamine in the high therapeutic range (R. Gorley 80). How much weight these laboratory reports would carry and a perception of how they reflected upon the true events that led up to the plaintiff's injury would be greatly influenced by a full disclosure of the contents of the shoe box. The fact that the mother of the plaintiff destroyed those contents, then denied doing so, was critical to an effective defense. Keeping those facts from the jury prejudiced the defendant.

It was a close question, even so. The jury was out for four days (C.17, 32). The verdict assigned 55% negligence to plaintiff and awarded no punitive damages (C. 34). A verdict for the defen-

dant might well have followed full disclosure of the witness Chames' testimony.

AS APPLIED, RULE 1616 IS UNCONSTITUTIONAL

The purpose of the Rules of Court is to make for the efficient and lawful administration of justice. Rule 1616 sacrifices justice for efficiency.

The Rules of Court are promulgated by the Judicial Council pursuant to Article 6, Section 6 of the California Constitution, which directs:

> "To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure, *not inconsistent with statute*, and perform the functions prescribed by statute." [emphasis supplied]

The requirement that Rules conform to statute came earlier. Prior to its amendment, the Constitution, in Article 1 Section 1a, provided that the Council shall:

> "(5) Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or may hereafter be in force*". [emphasis supplied]

Rule 1616 is not in accord with statute. Evidence Code Section 351 states that, except as otherwise provided by statute, all relevant evidence is admissible. Section 210 defines relevant evidence as: "evidence, *including evidence relevant to the credibility of a witness* or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [emphasis supplied]

It follows that a rule of court which bars evidence relevant to the credibility of a witness is to that extent void. The rule is inconsistent with the provisions of the evidence code and its enactment was therefore ultra vires. In *Albermont Petroleum Limited v. Cunningham* (1961) 186 Cal. App. 2d 84, 9 Cal. Rptr. 405, it was said, "Rules adopted by judicial council, *if they do not transcend legislative enactments*, have force of positive law and are as binding on the court and parties as procedural statutes."

[emphasis supplied]. Where the rule purports to transcend statute, it must perforce be ignored.

THE DEFENDANT WAS DEPRIVED OF DUE PROCESS BY THE COURT'S RULING

When a party is prevented from bringing out prior inconsistent statements of an opposition witness, the door to perjury is opened. When a defendant is prevented from proving that the mother of the plaintiff destroyed evidence, he is deprived of his Fourteenth Amendment due process right. Counsel for the defendant contended at trial that the right of the defendant to a fair trial on the merits was defeated if he was unable to present evidence which tended to prove perjury by the plaintiff's mother and her destruction of physical evidence (C. 19-26). The rule should have been disregarded, as in *In re Robin M.* (1978) 21 Cal.3d 337, 346, 146 Cal. Rptr. 352, (detention of minor).

Perjury of a witness destroys due process. This question has been faced in cases in which a criminal defendant contemplates perjury and conceals facts from counsel. The Constitution does not recognize the dilemma facing the client who decides that preservation of his freedom to lie under oath is more important than full disclosure to counsel, and who later suffers the consequences; the Constitution does not guarantee a criminal defendant a right to testify falsely *Harris v. New York*, 401 U.S. 222, 225 (1971). "(W)hen defendants testify, they must testify truthfully or suffer the consequences." *United States v. Havens*, 446 U.S. 620 at 626 (1980). "No lawyer will have knowingly participated in presenting perjured testimony. That is, in and of itself, a matter of crucial importance to the legal system's goal of seeking the truth" (*Havens* at 626). Unfortunately, plaintiff's lawyers stood silent when defense counsel told the trial judge that they were competent witnesses for impeachment testimony. No counsel for the plaintiff, neither Mr. Brazier nor Mr. Walker, disputed defense counsel's assertion that they, as well as both defense counsel, could testify to the fact of the prior inconsistent testimony of the witness Chames (R. Gorley 1/10-3/8). They took refuge in the Rule. Strict application of Rule 1616 will open the door to perjury and invite affected parties to depart selectively from testimony given in arbitration where that testimony is

uncomfortable for them. The jury at a trial de novo will be none the wiser, but justice will be ill served.

CONCLUSION

In summary, it is clear that the trial court erred in refusing to allow impeachment of the witness Chames, that the error caused substantial prejudice to defendant in that he was unable to present a complete defense and was thereby deprived of due process, and the system of justice was perverted in providing the witness the refuge of Rule 1616.

WHEREFORE, defendant prays that this Court reverse the judgment from which this appeal was taken.

Francis E.X. Murphy
Attorney for Appellant

Appendix B

Civil A028061
In the Supreme Court of the
State of California

Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the
Estate of
Lloyd E. Pyzer, M.D.,
Defendant and Appellant.

Petition for Review
of Decision of the Court of Appeal,
First Appellate District, Division Four

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In the Supreme Court of the
State of California

Carol Perry and Stanley Perry,
Plaintiffs and Respondents,

vs.

Doris L. Pyzer, Executrix of the
Estate of
LLoyd E. Pyzer, M.D.,
Defendant and Appellant.

PETITION FOR REVIEW

To the Honorable Chief Justice of California and the Associate Justices of the Supreme Court of California:

Doris L. Pyzer, Executrix of the Estate of LLoyd E. Pyzer, defendant and appellant, respectfully petitions for review following decision of the Court of Appeal, First Appellate District, Division Four, per Anderson, P.J., filed on September 17, 1986.

QUESTION PRESENTED

Is Rule 1616 (c) of the Rules of Court unconstitutional?

STATEMENT OF THE CASE

The appeal herein arose out of the denial of a defense motion to introduce impeaching testimony in a medical malpractice trial. The co-defendant physician had settled before trial. The witness was the mother of the plaintiff. The evidence sought to be introduced was that the witness had earlier testified that she had destroyed evidence, to wit, a shoe box full of drugs and medication taken from the plaintiff's residence immediately after plaintiff had suffered a cardiac arrest. Only three small envelopes of drugs, which were identified as coming from this defendant, were kept. The earlier testimony was given at an arbitration hearing. At the trial de novo, the witness testified that she had not seen the other drugs after turning them over to the hospital and denied having received them back and denied having destroyed them. Without

the impeaching evidence, the jury found a fifty-five percent comparable negligence attributable to the plaintiff.

The trial Court relied on Rule 1616 (c) of the Rules of Court in ruling that the impeaching testimony could not come in.

ARGUMENT

RULE 1616 (c) IS UNCONSTITUTIONAL IN THAT IT PURPORTS TO MODIFY THE LAW OF EVIDENCE WITHOUT STATUTORY AUTHORITY

It is well that this question comes before you at this time. It is a matter of first impression, although it is now more than six years since Rule 1616 (c) became effective. Thousands of arbitrations are calendared yearly. This method of dispute resolution gains popularity as a relatively speedy and inexpensive alternative to litigating in court. In the very first year of the application of the Rules, there were 26,000 matters listed for arbitration, more than half of them court ordered arbitrations, according to the Administrative Office of the Courts.

The Judicial Council made Rules of Court 1600 et seq. for the conduct of court ordered arbitrations. Provision is made for a trial de novo.

Rule 1616 (c) purports to restrict the admissability of evidence at a trial de novo in clear and certain terms: " . . . No reference may be made to . . . the evidence adduced at the arbitration hearing, and none . . . may be used as affirmative evidence, *or by way of impeachment*, or for any other purpose at the trial." [emphasis supplied].

The law of evidence is the province of the legislature. *Miller & Lux Inc. v. Secara* (1924) 193 C 755, 227 P 171; *Corso v. Security-First Nat. Bank* (1959) 171 CA2d 816, 342 P2d 56. A delegation of the legislative power to make rules of evidence must be direct, specific and unambiguous. No inference of delegation of this power will suffice. Penumbral authority of the Judicial Council does not extend to the modification, amendment or abrogation of the law of evidence.

The application of Rule 1616 (c) abrogates the Evidence Code. All relevant evidence is admissable under Section 351 of the Evidence Code, "except as otherwise provided by statute". Other statutes do condition the admissability of evidence. No rule of court does. The heirarchy of authority is: first, the Constitution, then statute, then rule. Statute does not control constitution, nor does rule control statute. To be valid, the modification of evidence law must be statutory.

No statutory basis exists for this nullification of Evidence Code Section 351. Rule 1616 is part of the rules formulated by the Judicial Council to comply with *Code of Civil Procedure § 1141.14*, which states:

> "Notwithstanding any other provision of law except the provisions of this chapter, the Judicial Council shall provide by rule for practice and procedure for all actions submitted to arbitration under this chapter. The Judicial Council rules shall provide for and conform with the provisions of this chapter. [Stats. 1979, c.473, § 2, operative July 1, 1979.]

The seductive first phrase of CCP § 1141.14, "Notwithstanding any other provision of law", invites the thought that the rules authorized by the chapter are intended to prevail over conflicting statutes. That is not what the phrase means. Parsing the sentence, we see that it says that whatever other laws might say about rule making, the Judicial Council is the body what will make the rules for these arbitrated matters. It does not say the rules will prevail over conflicting statutes. If it did, that would be an unconstitutional delegation of the legislative power, for constitutional stricture holds the Judicial Council to the making of rules "not inconsistent with statute".

The Judicial Council is a constitutionally authorized agency and therefore not subject to the ordinary limitations of the doctrine of separation of powers. Nevertheless, any delegation of power to this agency must be kept within the bounds of the constitutional authorization.

Rule 1616 (c) enlarges the statute by modifying the law of evidence. As Justice Tobriner stated, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are

void and court not only may, but it is their obligation to strike down such regulations. *Mooney v. Pickett* (1971) 4 Cal. 3d 669, 483 P.2d 1231, 94 Cal. Rptr. 279. The statute, CCP § 1141.14, calls for rules governing arbitration proceedings, not court proceedings.

RULE 1616 (c) IS UNCONSTITUTIONAL AS OFFENDING THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The Federal constitution is offended by Rule 1616 (c). The Fourteenth Amendment rights of due process and equal protection are invaded. The Rule is unconstitutional in that by barring him from a full exposition of his case and preventing him from exposing perjured testimony, the litigant is deprived of a fair trial and due process. A defendant has the right to cross examine witnesses against him and to produce evidence in refutation. *Willner v. Committee* (1963) 373 U.S. 96, 83 S.Ct. 1175, 1180, 10 L.Ed.2d 224, 229; *Cal. Evidence 2d*, §§ 33, 34. The litigant is deprived of equal protection of the law as one of the group whose matters were arbitrated. Those who are impacted by the rule are litigants whose controversies are submitted to arbitration under the rules. They are many. The selection of this group for exclusion of impeaching evidence is not rationally necessary nor reasonable.

Dealing with the same question of admissibility, the Federal Rule does not discriminate. *Rule 500-7(b)* for the Northern District of California provides as follows:

> Trial De Novo (b) *Limitation on Evidence.* At a trial de novo, unless the parties have otherwise stipulated, no evidence of or concerning the arbitration may be received into evidence, *except that statements made by a witness at the arbitration hearing may be used for impeachment only.* [emphasis supplied]

The Federal rule shows a recognition of the constitutional requirements that apply to both Federal and State forums.

The integrity of the judicial process is undermined by insulating a perjuring witness from impeachment. The corrosion of the standards of candor, truth and fairness are readily perceived. No

attorney should knowingly participate in the presentation of perjured testimony. No attorney should be placed in a position in which his clients' interests appear best protected by invoking a rule which shelters perjured testimony. *United States v. Havens* (1980) 446 U.S. 620 at 626.

CONCLUSIONS

Rule 1616 (c) derives from a misreading of Section 1141.14 of the Code of Civil Procedure, in that the statute provides for the regulation of arbitration proceedings, not the regulation of court proceedings.

Rule 1616 (c) is facially unconstitutional. It lacks the necessary statutory basis to make any change in the law of evidence and should be struck down as an impermissible enlargement of the statute which is its foundation.

Rule 1616 (c) as applied infringes the Fourteenth Amendment due process and equal protection clauses by interfering with the right of the litigant to cross examine witnesses against him and to produce evidence in refutation.

Petitioner requests that this petition for review be granted and that the cause be set for argument.

Respectfully submitted,

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